

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Counsel for the Plaintiff

1 APPEARANCES CONTINUED:

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08:29:44 3

THE COURT: Good morning. Please be seated. I

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have reviewed the requests to seal and if the parties are

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going to make it a minimal amount and the information to be

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elicited or the testimony to be elicited in that time is

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highly sensitive competitive information, third-party, so I

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will grant the motion to seal, just do it at the very end of

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the direct and the beginnings of the cross.

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Thank you.

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MR. BLUMENFELD: Thank you. With respect to the

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request that we sent on behalf of ASR for Mr. Sproull,

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Mr. Sproull can only be here today. We're calling him as a

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witness. So we're planning on calling him out of order.

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The government has agreed that we can do that. And so if

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it's acceptable to Your Honor, we will call him at some time

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today. I don't think he's arrived in Delaware yet, but when

08:30:41 18

he gets here.

08:30:41 19

THE COURT: That's fine. I think that was in

08:30:42 20

the e-mail, too. That's fine. Thank you.

08:30:52 21

MR. BLUMENFELD: Thank you.

08:30:52 22

THE COURT: What's next?

08:30:52 23

MR. WOLIN: Now we're going to call our next

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witness.

08:30:52 25

THE COURT: Who? Great. That's okay. Who is

Cagle - direct

08:31:03 1 it?

08:31:04 2 MR. WOLIN: We're going to call Heath Cagle, the
08:31:08 3 chief financial officer of Piedmont Candy.

08:31:11 4 THE COURT: All right. Thank you.

08:31:43 5 COURT CLERK: Please raise your right hand.
08:31:48 6 Please state and spell your full name for the record.

08:31:51 7 THE WITNESS: Michael Heath Cagle,
08:31:56 8 M-I-C-H-A-E-L, H-E-A-T-H, C-A-G-L-E.

08:32:01 9 MICHAEL HEATH CAGLE, having been duly sworn was
08:32:06 10 examined and testified as follows:

08:32:07 11 THE COURT: Good morning.

08:32:09 12 THE WITNESS: Good morning.

08:32:11 13 MS. SINKLER: Good morning, Your Honor. Chinita
08:32:14 14 Sinkler representing the United States.

08:32:15 15 THE COURT: Please, go ahead.

08:32:16 16 MS. SINKLER: Thank you.

08:32:17 17 DIRECT EXAMINATION

08:32:18 18 BY MS. SINKLER:

08:32:19 19 Q. Good morning, Mr. Cagle.

08:32:20 20 A. Good morning.

08:32:21 21 Q. You have a binder of exhibits from both the United
08:32:22 22 States and the defendant. You can just leave those there
08:32:23 23 for now and once we get to those, I'll let you know. Okay?

08:32:24 24 A. Okay.

08:32:25 25 Q. Would you state your full name please?

Cagle - direct

08:32:32 1 A. Michael Heath Cagle.

08:32:34 2 Q. Where do you work?

08:32:35 3 A. Piedmont Candy Company.

08:32:38 4 Q. If I say Piedmont or Piedmont Candy, will you know
08:32:42 5 I'm referring to your company?

08:32:43 6 A. Yes, ma'am.

08:32:43 7 Q. Where is Piedmont Candy located in North Carolina?

08:32:46 8 A. About sixty miles north of Charlotte.

08:32:50 9 Q. How many manufacturing plants does the Piedmont Candy
08:32:51 10 have in North Carolina?

08:32:51 11 A. Two.

08:32:51 12 Q. How many employees does Piedmont Candy have?

08:32:51 13 A. Today around eighty-five.

08:33:01 14 Q. What type of business is Piedmont?

08:33:01 15 A. Manufacturer of candy and then mix of like trail mix.

08:33:11 16 Q. Would you describe more so the products that Piedmont
08:33:21 17 Candy makes?

08:33:21 18 A. On the candy side, it's a -- the majority of what we
08:33:21 19 make is a soft peppermint puff, so it's like a star light,
08:33:31 20 it's not hard, it melts in your mouth. On the mix side we
08:33:31 21 make the sweet mix, it's a low calorie mix, a low sugar mix
08:33:31 22 where it has pretzels, Chex mix and then it's got a low
08:33:41 23 calorie or low sugar chocolate coating.

08:33:41 24 Q. What is the name of the low sugar mix you referred
08:33:51 25 to?

Cagle - direct

08:33:52 1 A. Thinful.

08:33:53 2 Q. Approximately what percent of Piedmont Candy's yearly

08:33:58 3 sale are from the soft puff candy versus the snack mix?

08:34:03 4 A. Currently about 98 percent.

08:34:04 5 Q. Are the peppermint puffs sold under a brand name?

08:34:08 6 A. Yes.

08:34:08 7 Q. What is that?

08:34:09 8 A. It's Red Bird Candy.

08:34:11 9 Q. Where is Red Bird Candy sold?

08:34:14 10 A. National retailers throughout the Continental United

08:34:19 11 States. For example, Wal-Mart, Walgreen's, CVS, Family

08:34:25 12 Dollar, Dollar Tree, Dollar General.

08:34:27 13 Q. What are the ingredient that go into making the Red

08:34:31 14 Bird puffs?

08:34:33 15 A. It's going to be pure cane sugar, invert sugar,

08:34:36 16 peppermint oil and a red flavoring.

08:34:41 17 Q. Is the pure cane sugar that's used to make the Red

08:34:44 18 Bird Candy extra fine granulated sugar?

08:34:46 19 A. Yes, EFG.

08:34:48 20 Q. What percentage of the Red Bird Candy is made of EFG

08:34:52 21 sugar?

08:34:53 22 A. All of it.

08:34:56 23 Q. And approximately how many pounds of EFG does

08:35:01 24 Piedmont buy on a yearly basis?

08:35:03 25 A. This year we're contracted for 12 million pounds.

Cagle - direct

08:35:07 1 Q. Approximately how much money does Piedmont spend on
08:35:11 2 EFG on a yearly basis?

08:35:13 3 A. So it's around this year we're contracted around
08:35:18 4 \$0.44, so 12 million pounds times \$0.44, 5 million, 5 or 6
08:35:26 5 million.

08:35:27 6 Q. What is Piedmont's total yearly spend for the
08:35:31 7 ingredients to make its product?

08:35:34 8 A. For the raw material ingredients?

08:35:38 9 Q. Yes.

08:35:39 10 A. 6.5, 7 million.

08:35:41 11 Q. Does it matter if Piedmont pays the lowest price for
08:35:46 12 sugar?

08:35:46 13 A. Absolutely.

08:35:47 14 Q. How so?

08:35:49 15 A. It's our biggest ingredient, it's our biggest spend
08:35:54 16 by far, so if we pay more for sugar, we are either have to
08:35:58 17 make less profit or we have to pass that on to the customer.

08:36:01 18 Q. Could you quantify for us, if you pay a penny more a
08:36:07 19 pound, what does that mean for the company?

08:36:09 20 A. So a penny more a pound if we purchase 12 million
08:36:13 21 pounds, that's around \$120,000 worth of profit, so for every
08:36:18 22 penny you can think of, it around \$120,000 worth of profit,
08:36:23 23 unless we're able to take a price increase to the customer.

08:36:26 24 Q. What else if you had to pay more for sugar, would the
08:36:31 25 company need to take any other steps to offset that price?

Cagle - direct

08:36:33 1 A. Yes. We would potentially look at cutting the labor
08:36:39 2 force or right sizing the labor force, or since we're in
08:36:45 3 manufacturing, that's kind of challenging to do, we would
08:36:48 4 have to look at reducing wages, things of that sort.

08:36:52 5 Q. Why does Piedmont Candy use cane sugar?

08:36:57 6 A. Historically that's -- that's what our candy has
08:37:01 7 always been made of. We want to use the best of ingredients
08:37:08 8 so we use pure cane sugar. And that's what we have been
08:37:12 9 able to use to manufacture so it would actually turn into a
08:37:16 10 soft peppermint puff.

08:37:17 11 Q. Does Piedmont use any high fructose corn syrup to
08:37:21 12 make its candy?

08:37:24 13 A. No, ma'am.

08:37:25 14 Q. Why not?

08:37:26 15 A. It not a natural ingredient first, plus it would
08:37:29 16 taste different than your current product if we used that.

08:37:31 17 Q. Does Piedmont use any liquid sugar in its candy?

08:37:34 18 A. Not currently.

08:37:37 19 Q. Why not?

08:37:39 20 A. We've used liquid sugar in the past, but liquid sugar
08:37:42 21 versus dry sugar there is a production process, production
08:37:45 22 part of it that makes it more difficult to produce, and then
08:37:48 23 part of that is liquid sugar is more unstable versus dry
08:37:51 24 sugar and you don't really know what you're getting until
08:38:00 25 you start the cooking process. Plus it's more expensive

Cagle - direct

08:38:04 1 than dry sugar, I mean -- yes.

08:38:06 2 Q. First you said there is a production issue with
08:38:10 3 liquid sugar. Could you explain?

08:38:13 4 A. Right. So liquid sugar obviously comes in a liquid
08:38:19 5 form, so you have to cook it and cook all the liquid or the
08:38:23 6 water out of it. Plus when it arrives to you versus dry
08:38:26 7 sugar it's not a stable, so for example, when we got liquid
08:38:32 8 sugar in the past, it would be transported from Florida and
08:38:37 9 it's transported in steel tanks so especially in the
08:38:41 10 summertime it can actually start to cook a little bit before
08:38:44 11 it arrives if it's really hot outside. So the manner in
08:38:47 12 which you get the product is not always the same. So then
08:38:51 13 the starting point of the cooking process can be different.

08:38:54 14 Q. You also said it was more expensive. What do you
08:39:00 15 mean?

08:39:01 16 A. Well, there is water in it first of all, so I mean
08:39:04 17 it's not all liquid sugar when it arrives to you, there is a
08:39:08 18 certain part of water in the mix, otherwise it would just
08:39:11 19 turn into a congealed gel before it arrives. So you're
08:39:15 20 actually paying the transportation costs of transporting
08:39:19 21 water from wherever it's coming from in the freight and then
08:39:23 22 secondly, you're paying whoever the manufacturer is to turn
08:39:27 23 it from a dry sugar to a liquid sugar, so there is
08:39:31 24 additional labor costs on their part.

08:39:33 25 Q. Do you use beet sugar to make your candy?

Cagle - direct

08:39:36 1 A. No.

08:39:36 2 Q. Why not?

08:39:37 3 A. It's not the same as pure cane sugar. We have tried
08:39:41 4 to use it, the company has tried to use it in the past many,
08:39:45 5 many, many years ago and we could never get it to turn into
08:39:49 6 a soft peppermint puff, and then, whatever it was left of it
08:39:54 7 wouldn't taste the same as a pure cane sugar anyway.

08:39:57 8 Q. Why did Piedmont take the step to try both beet sugar
08:40:03 9 and liquid sugar to make its candy?

08:40:08 10 A. Beet sugar is cheaper generally so it would have been
08:40:11 11 to save cost.

08:40:12 12 Q. I want to focus a little bit on your job history.
08:40:18 13 About how long have you worked at Piedmont?

08:40:20 14 A. Since 2006, so sixteen years.

08:40:23 15 Q. What is your current job title?

08:40:25 16 A. Chief financial officer.

08:40:27 17 Q. Who do you report to as the CFO?

08:40:29 18 A. The CEO.

08:40:31 19 Q. Would you tell us your responsibilities as CFO?

08:40:35 20 A. Well, we're a small company so as with any small
08:40:40 21 company there is every employee has a vast array of
08:40:43 22 responsibilities but my main responsibilities are to report
08:40:47 23 the financials on a monthly basis to the team, to the board,
08:40:51 24 and to Plexus, the majority of the company, and then
08:41:00 25 budgeting responsibilities, controllership responsibilities,

Cagle - direct

08:41:05 1 looking backward to report the financials, as far as
08:41:09 2 budgeting the forecasting of the cash flow and then for the
08:41:13 3 next fiscal year the budget. And then also handle the
08:41:20 4 audits on an annual basis, fiscal year end audits.

08:41:25 5 Q. Do you have a team of people to help you?

08:41:27 6 A. One person.

08:41:28 7 Q. Do you have any responsibilities related to buying
08:41:31 8 sugar?

08:41:32 9 A. Currently, yes, my -- that's one of my
08:41:37 10 responsibilities. I'm the main point of contact for the
08:41:40 11 negotiation of the sugar contracts.

08:41:42 12 Q. What does that mean to be the main point of contact?

08:41:45 13 A. So I'm the one who either reaches out to the vendors
08:41:49 14 or they reach out to me to start the negotiation practices
08:41:53 15 to try to get bids for the sugar for the next year. And
08:41:57 16 then, throughout that process I would work with the vendors
08:42:00 17 to negotiate for the best price, make a recommendation to
08:42:05 18 the CEO and the board and then follow through on the -- for
08:42:10 19 the contract.

08:42:11 20 Q. Before you became the main point of contact for
08:42:14 21 buying sugar, did you have any responsibilities related to
08:42:17 22 buying sugar for the company?

08:42:20 23 A. My responsibilities were to just basically discuss it
08:42:25 24 with the CEO, the CEO was the one who handled what I would
08:42:30 25 do now, we would talk about it. Once the recommendation was

Cagle - direct

08:42:35 1 approved by the board, then my part was to make sure that
08:42:37 2 the contract was what we needed it to be from the vendor.

08:42:42 3 Q. Are there any criteria Piedmont Candy considers in
08:42:47 4 general terms when deciding who to buy your sugar from?

08:42:52 5 A. Well, first we -- we want to make sure that we have
08:42:59 6 familiarity with the vendors that we're getting quotes from,
08:43:03 7 at least from historical where we've used them before
08:43:07 8 historically, or we've gotten quotes from them in the past
08:43:14 9 so the other criteria we're going to look at is hopefully
08:43:19 10 they're reasonably close to Piedmont Candy. In order for
08:43:24 11 them to be competitively priced and be able to service us,
08:43:29 12 it would be obvious the closer they are to our facility the
08:43:34 13 better it would be from a freight perspective. And then
08:43:39 14 also criteria would be that we feel comfortable with and
08:43:44 15 confident that they can service our needs. Obviously as we
08:43:49 16 talked about before, sugar is very important to our company
08:43:54 17 so if we -- you know, we get probably three loads of sugar
08:43:59 18 each week, if they can't service us or provide the sugar on
08:44:04 19 time, we can't run the facility. There is a service aspect
08:44:09 20 of it or reliability aspect of it as well.

08:44:09 21 Q. How often does Piedmont Candy contract to buy sugar?

08:44:14 22 A. Once a year.

08:44:19 23 Q. Could you tell us how you start the process?

08:44:24 24 A. We have some ongoing conversation through the vendors
08:44:29 25 throughout the year just to see where things stand and what

Cagle - direct

08:44:25 1 we think the price is going to be, but around this time of
08:44:28 2 year ---around this time of year we would start to look to
08:44:32 3 buy contract for 2023. I would reach out to vendors and ask
08:44:36 4 them for pricing or they may have already reached out to me
08:44:40 5 and asked me if we were going to be -- how much sugar we
08:44:43 6 were looking for for the next year and provide pricing.

08:44:46 7 Q. And what happens next?

08:44:48 8 A. I receive pricing from the vendors. I gather all the
08:44:52 9 information. Then I start depending on how the prices fall
08:44:56 10 out, you can kind of see where the market is, and I start
08:45:00 11 having conversations with those vendors about how much of
08:45:04 12 their capacity they have contracted so far.

08:45:10 13 So for us, we don't want to be the first to
08:45:14 14 contract and we don't want to be the last to contract, we
08:45:18 15 want to kind of be in the middle. If you're the first you
08:45:22 16 may pay a price that's way too high. And then if you're
08:45:26 17 last when they've contracted most of their volumes, they
08:45:30 18 don't really have an incentive to offer a low price so we
08:45:34 19 want to be right in the middle.

08:45:38 20 Q. When thinking about which vendors to contact or
08:45:42 21 invite to bid for you, how do you decide who you should
08:45:46 22 reach out to?

08:45:50 23 A. Well, first we look at who has been able to supply us
08:45:54 24 in the past and provide us the needs that we need. So it
08:45:58 25 would be historical performance. And then on occasion we

Cagle - direct

08:46:01 1 bring in new vendors to quote us as well to see if -- and
08:46:08 2 really, there has been, only been a couple historically that
08:46:13 3 we've used over the last ten years or so, so we're trying to
08:46:17 4 get other pricing to make sure the prices they're giving us
08:46:22 5 we're certain can service us are in line with the prices
08:46:25 6 those current vendors give us.

08:46:27 7 Q. When you're in the process of negotiating your prices
08:46:30 8 for sugar, do you say anything to the vendor about who they
08:46:36 9 may be competing against for your business?

08:46:39 10 A. Not by me.

08:46:41 11 Q. Could you give us what you may say?

08:46:47 12 A. They all know or most of them know who we have
08:46:51 13 contracted with in the past are and who they're competing
08:46:53 14 against for the business. So if they provide a price, let's
08:46:57 15 say it's 20 percent higher than another vendor, and they
08:47:01 16 asked me where they stand from a pricing perspective and how
08:47:04 17 they could get the business, I would say well, you're
08:47:08 18 higher, you're higher than the other vendors that have been
08:47:11 19 quoting us.

08:47:13 20 Q. Does Piedmont pay a delivered price for the sugar
08:47:17 21 it's buying?

08:47:19 22 A. Yes, we prepay.

08:47:20 23 Q. How is the sugar delivered to Piedmont's
08:47:24 24 manufacturing facility?

08:47:25 25 A. It's a full tractor trailer loads that are delivered.

Cagle - direct

08:47:29 1 Q. Do you receive any deliveries on railcars?

08:47:33 2 A. No.

08:47:34 3 Q. Why not?

08:47:37 4 A. There is a rail in Lexington, we don't have an
08:47:41 5 ability at Piedmont Candy to unload the -- if we did receive
08:47:46 6 it on the rail, unload it from the rail to get it to our
08:47:50 7 facility.

08:47:50 8 Q. Why do you buy sugar paying a delivered price?

08:47:54 9 A. An FOB price which means that we would be responsible
08:48:00 10 for setting up the trucks to pick up the sugar and deliver
08:48:04 11 it to our facility, there is two reasons why we wouldn't do
08:48:08 12 that. First of all administrative burden of assigning the
08:48:12 13 trucks to pick up from whoever we're getting it from. And
08:48:16 14 then secondly, when we get a prepaid price like for next
08:48:20 15 year, we know what our sugar price is going to be including
08:48:24 16 freight, so if freight goes up or even down, but more
08:48:28 17 specifically up, we would have to absorb that additional
08:48:32 18 freight costs to get it to our facility. So that would be
08:48:36 19 very hard to budget for if we don't know actually what the
08:48:40 20 transportation industry is going to do, because those costs
08:48:44 21 are going to go up and down depending on what's happening
08:48:48 22 with the transportation industry.

08:48:48 23 Q. Let's look at some Piedmont Candy's specific bids
08:48:52 24 received for sugar. I would like you to take a look at JTX
08:48:56 25 027. I'm going to ask Ms. Martinez to put up the native. I

Cagle - direct

08:49:02 1 ask the Court to please not publish it to the gallery
08:49:06 2 because it contains confidential information. It should be
08:49:09 3 on your screen.
08:49:12 4 A. Okay.
08:49:13 5 Q. Do you recognize JTX 027? It should be on the screen
08:49:20 6 in front of you or is it in the binder. It won't be on the
08:49:23 7 public screen.
08:49:25 8 A. Okay. Yes, I do.
08:49:27 9 Q. What is it?
08:49:30 10 A. This is the Excel file that I use to record and kind
08:49:31 11 of look at the quotes for sugar that I'm getting each year.
08:49:41 12 Q. Did you create JTX 027?
08:49:41 13 A. Yes, this is an Excel file that I created and I
08:49:51 14 maintain.
08:49:51 15 Q. Does anyone else review JTX 027?
08:49:51 16 A. The CEO would review it, yes.
08:50:01 17 Q. Do you maintain this in the ordinary course of your
08:50:02 18 duties at Piedmont?
08:50:04 19 A. Yes.
08:50:06 20 MS. SINKLER: Your Honor, I would like to offer
08:50:07 21 JTX 027 into evidence.
08:50:09 22 MR. BUTERMAN: No objection.
08:50:10 23 THE COURT: Thank you. It's so admitted.
08:50:12 24 MS. SINKLER: Thank you, Your Honor.
08:50:14 25 (JTX Exhibit No. 27 was admitted into evidence.)

Cagle - direct

08:50:15 1 BY MS. SINKLER:

08:50:16 2 Q. Mr. Cagle, if you look at column A, the column headed

08:50:20 3 A starting with the word Product all the way to your left.

08:50:25 4 Do you see that?

08:50:25 5 A. Yes.

08:50:25 6 Q. Could you describe just sort of generally for the

08:50:28 7 Court what information is contained on this spreadsheet?

08:50:32 8 A. So it list the product, and in this case which EFG

08:50:36 9 cane sugar for this product. And the volume would be the

08:50:41 10 amount that we're looking to contract, in this case it's 10

08:50:44 11 million pounds. The package that we're looking for it to be

08:50:48 12 in, which is 2,000 pound totes and then the period which is

08:50:51 13 in this case, January 21st through December 21st. And then

08:50:58 14 below it starts to list out the quotes that we received from

08:51:01 15 each vendor and the details behind that.

08:51:04 16 Q. Thank you.

08:51:05 17 And if you look all the way to the right, there

08:51:09 18 is a column headed Current Pricing. Do you see that?

08:51:12 19 A. Yes.

08:51:13 20 Q. Would you just describe generally what that

08:51:15 21 information is showing?

08:51:16 22 A. That would show what our current pricing is. So this

08:51:20 23 example, this is pricing for 2020, the current pricing for

08:51:23 24 2020, and I'm trying to get quotes for pricing for 2021.

08:51:32 25 Q.

Cagle - direct

08:51:34 1 MS. SINKLER: Your Honor, at this time I would
08:51:36 2 request to close the courtroom for the rest of the witness's
08:51:39 3 testimony.

08:51:39 4 THE COURT: All right. For the reasons that
08:51:40 5 I've already stated, we will close the courtroom as this is
08:51:45 6 sensitive information for a third party, so anybody who is
08:51:51 7 not under a protective order, I would ask you to leave for a
08:51:54 8 few minutes.

08:51:56 9 MS. SINKLER: Thank you, Your Honor.

08:51:58 10 (Courtroom sealed.)

08:52:01 11 MS. SINKLER: We can publish this for the
08:52:07 12 gallery. Thank you.

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Cagle - direct

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Cagle - direct

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MR. BUTERMAN: Your Honor, I think at this point I can do -- if I have to do anything else, I'll do it without reference to numbers so I think we can unseal the courtroom.

THE COURT: Let's take that off the screen and open the courtroom. Thank you.

(Courtroom unsealed.)

THE COURT: All right.

BY MR. BUTERMAN:

Q. Now, Mr. Cagle, you mentioned that Piedmont only uses

Cagle - cross

09:14:47 1 cane sugar to make its peppermint puffs, correct, sir?

09:14:50 2 A. Yes.

09:14:51 3 Q. And the reason that it uses cane sugar has nothing to
09:14:56 4 do with any issues with respect to GMO; correct?

09:15:00 5 A. Correct.

09:15:01 6 Q. Piedmont believes that it can't use beet sugar
09:15:05 7 because it doesn't form into the product and hold to where
09:15:10 8 you can turn it into a soft peppermint puff, is that
09:15:14 9 correct, sir?

09:15:14 10 A. We have not been able to, yes.

09:15:14 11 Q. But to your knowledge, Piedmont hasn't attempted to
09:15:14 12 make its peppermint puffs using beet sugar in over a decade,
09:15:24 13 isn't that correct?

09:15:24 14 A. That is correct.

09:15:25 15 Q. And you don't know if Piedmont has any studies that
09:15:28 16 support the notion that it can't use beet sugar to
09:15:31 17 manufacture its peppermint puffs; correct?

09:15:31 18 A. Correct.

09:15:31 19 Q. Now you are aware that beet sugar and cane sugar are
09:15:32 20 chemically identical, correct?

09:15:42 21 A. Yes.

09:15:42 22 Q. But nonetheless, it's Piedmont's position that for
09:15:50 23 its peppermint puffs, beet sugar cannot be used to make the
09:15:54 24 product; correct, sir?

09:15:52 25 A. Yes, and the same product that we end up with now.

Cagle - cross

09:16:01 1 Q. And you are not aware of any product manufactured by
09:16:08 2 any company in the entire world that faces a similar issue
09:16:14 3 where it cannot be manufactured by beet sugar but can be
09:16:18 4 manufactured by cane sugar, correct, sir?

09:16:20 5 A. I'm not aware of any.

09:16:22 6 Q. Now, we also talked about liquid sugar and Piedmont
09:16:26 7 doesn't make its peppermint puffs with liquid sugar anymore,
09:16:30 8 correct, sir?

09:16:31 9 A. Correct.

09:16:31 10 Q. And that's because Piedmont believes that using
09:16:34 11 liquid sugar will make the manufacturing process more
09:16:38 12 difficult; correct?

09:16:38 13 A. It's more than believe, we know that to be true for
09:16:41 14 our manufacturing process.

09:16:45 15 Q. But, Piedmont hasn't done any studies to back up it's
09:16:50 16 statement that the consistency is not as good when it uses
09:16:53 17 liquid sugar, correct, sir?

09:16:55 18 A. Formal studies, no, but we ran the product and it's
09:16:59 19 different.

09:16:59 20 Q. And, in fact, Piedmont used liquid sugar for almost a
09:17:04 21 decade to make its product, correct?

09:17:06 22 A. That's correct.

09:17:06 23 Q. In fact, it was using liquid sugar as late as 2018 at
09:17:11 24 least to make its product, correct?

09:17:14 25 A. That's correct.

Cagle - cross

09:17:19 1 Q. Piedmont also buys -- only buys sugar in 2,000 pound
09:17:23 2 totes, correct?

09:17:24 3 A. Currently.

09:17:25 4 Q. And Piedmont only buys sugar in 2,000 pound totes
09:17:31 5 that are delivered by trucks; correct?

09:17:34 6 A. Currently, yes.

09:17:35 7 Q. Piedmont doesn't purchase any bulk sugar that does
09:17:39 8 not come in bags, correct?

09:17:41 9 A. No.

09:17:42 10 Q. I want to make sure that we have the answer. Does
09:17:44 11 Piedmont purchase any bulk sugar that does not come in bags?

09:17:50 12 A. No.

09:17:51 13 Q. And Piedmont doesn't purchase any bulk sugar that
09:17:54 14 comes in rails, correct?

09:17:56 15 A. We do not.

09:17:57 16 Q. Piedmont doesn't buy sugar in bags of other sizes
09:18:02 17 than 2,000 pound totes, correct?

09:18:04 18 A. Currently no, we do not.

09:18:06 19 Q. But in the past it has bought in other sizes?

09:18:12 20 A. Yes.

09:18:13 21 Q. And as you testified a moment ago, Piedmont also
09:18:16 22 decided that it prefers to only buy from one company at a
09:18:22 23 time, correct, sir?

09:18:24 24 A. That's correct.

09:18:25 25 Q. And that's because Piedmont believes that even if

Cagle - cross

09:18:26 1 it's using cane sugar, if it switches from say Imperial cane
09:18:31 2 sugar to United's cane sugar, that that could mess up its
09:18:36 3 production process; correct, sir?

09:18:39 4 A. It has messed up, yes.

09:18:42 5 Q. And again, Piedmont is not aware of any other company
09:18:47 6 that has indicated that they have a problem using cane sugar
09:18:54 7 from two cane producers, correct?

09:18:56 8 A. I'm not aware of any.

09:18:59 9 Q. In fact, you are aware that there are numerous
09:19:02 10 companies that buy sugar, cane sugar from multiple vendors
09:19:07 11 each year, correct?

09:19:08 12 A. Yes.

09:19:09 13 Q. So to be clear, if there is a company that only sells
09:19:12 14 liquid sugar, Piedmont is not going to contract with them to
09:19:17 15 buy sugar to make the peppermint puffs, correct?

09:19:20 16 A. Currently no.

09:19:21 17 Q. And if there is a company that only sells beet sugar,
09:19:25 18 Piedmont is not going to contract with them to buy that
09:19:28 19 sugar to make their peppermint puffs, correct, sir?

09:19:31 20 A. Currently no.

09:19:32 21 Q. And if there is a company that's going to transport
09:19:34 22 their sugar by rail, Piedmont is not going to contract with
09:19:38 23 then to make their peppermint puffs, correct, sir?

09:19:41 24 A. Correct.

09:19:42 25 Q. If there is a company that doesn't offer 2,000 pound

Cagle - cross

09:19:44 1 totes, Piedmont won't contract with them to buy the sugar to
09:19:48 2 make the peppermint puffs, correct?

09:19:50 3 A. Unless it's more than 2,000 pounds, correct.

09:19:53 4 Q. And so to sum up, and when you say more than
09:19:56 5 2,000 pounds, you mean that sometimes totes are 2,200 pounds
09:19:59 6 as opposed to 2,000?

09:20:01 7 A. That's correct, yes.

09:20:02 8 Q. Okay. But to sum up, Piedmont will only purchase dry
09:20:07 9 refined cane sugar that comes in 2,000 pound totes that is
09:20:12 10 transported to Lexington, North Carolina via truck; correct,
09:20:19 11 sir?

09:20:19 12 A. In the current state, yes, that's correct.

09:20:21 13 Q. Sir, are you aware of any other company in the entire
09:20:25 14 United States that has those kinds of particular unique
09:20:29 15 purchasing limitations?

09:20:32 16 A. I am not aware of any. There is only three people
09:20:36 17 that make the soft peppermint puffs, though.

09:20:40 18 Q. But my question is, are you aware of any -- I'm not
09:20:43 19 asking about peppermint puffs, I'm asking about any
09:20:46 20 industrial product in the United States, are you aware of
09:20:50 21 any company in the country that has unique purchasing
09:20:52 22 limitations like those?

09:20:52 23 A. No.

09:20:56 24 Q. And so it's fair to say, sir, that the competitive
09:21:00 25 dynamic that Piedmont faces, they're probably not

Cagle - cross

09:21:04 1 representative of what other companies in the United States
09:21:07 2 face, is that fair?

09:21:08 3 A. I guess that could be fair.

09:21:10 4 Q. And that would go for the government's alleged
09:21:13 5 southeast market as well?

09:21:19 6 A. What do you mean by that?

09:21:21 7 Q. That's okay. Nevermind. I'll withdraw that
09:21:24 8 question.

09:21:24 9 Now, Piedmont believes nonetheless, despite
09:21:28 10 everything that we just said, that it's able to receive a
09:21:32 11 competitive price for sugar utilizing the four to five
09:21:36 12 quotes it currently gets on a yearly basis, correct?

09:21:39 13 A. Correct.

09:21:40 14 Q. And Piedmont believes and feels that if it needed to
09:21:44 15 get an additional quote or two in order to receive a
09:21:48 16 competitive price for its sugar, that it could do that,
09:21:52 17 right, sir?

09:21:52 18 A. Yes.

09:21:53 19 Q. Now, you talked about this a little bit earlier, but
09:21:57 20 during your deposition, you mentioned that before Piedmont
09:22:01 21 would sign a contract with a supplier, it needed to feel
09:22:05 22 comfortable with that supplier. Do you remember talking
09:22:09 23 about that?

09:22:09 24 A. Yes.

09:22:10 25 Q. And currently the only companies that you say that

Cagle - cross

09:22:12 1 you're comfortable with are United and Imperial, correct,
09:22:16 2 sir?

09:22:17 3 A. Correct.

09:22:17 4 Q. And for instance, you said that Piedmont isn't
09:22:22 5 comfortable with Cargill; right?

09:22:26 6 A. We haven't fully vetted Cargill, so we obviously
09:22:29 7 wouldn't be comfortable with them.

09:22:31 8 Q. And the reason that you said that you weren't
09:22:33 9 comfortable with Cargill was because you thought they were
09:22:37 10 too big, right?

09:22:38 11 A. I think I did use the word big, but, yes, their main
09:22:45 12 source of business is not just selling sugar like United and
09:22:49 13 Imperial is.

09:22:53 14 Q. So what you said in your deposition, though, is you
09:22:55 15 feared because you weren't purchasing enough for them, you
09:22:58 16 weren't going to be as high on the totem pole, do you recall
09:23:01 17 that?

09:23:01 18 A. Yes.

09:23:02 19 Q. So you're most comfortable with them.

09:23:04 20 Now, sir, when counsel was questioning you
09:23:08 21 earlier?

09:23:13 22 THE COURT: Do you have water? Do you need any
09:23:17 23 water?

09:23:17 24 THE WITNESS: I have some. Thank you.

09:23:19 25 THE COURT: Okay.

Cagle - cross

09:23:22 1

BY MR. BUTERMAN:

09:23:24 2

Q. When counsel was questioning you earlier, you

09:23:26 3

mentioned that if you had to pay more for your sugar, that

09:23:29 4

it would be bad for your company, correct, sir?

09:23:32 5

A. Correct.

09:23:33 6

Q. In fact, you said that you might have to cut labor

09:23:37 7

and reduce wages?

09:23:40 8

A. That could be one extreme that we would have to do.

09:23:43 9

Q. So you would say that you do everything possible to

09:23:44 10

ensure that you get the lowest price for the sugar that

09:23:51 11

you're purchasing, correct?

09:23:53 12

A. We try to.

09:23:54 13

Q. And you also said that in order for companies to be

09:24:03 14

competitively priced and able to service you, it would

09:24:04 15

obviously be better if they were closer located to your

09:24:12 16

plant in North Carolina from a freight perspective; right?

09:24:14 17

A. I would think that would be a way that we could get a

09:24:20 18

lower price from a vendor if their facility was closer to

09:24:23 19

Lexington.

09:24:24 20

Q. And you are currently contracted to be purchasing

09:24:26 21

your sugar from United; correct for 2022?

09:24:32 22

A. Yes.

09:24:34 23

Q. United only produces sugar from Clew -- excuse me, US

09:24:42 24

Sugars, United only sells sugar that is made by US Sugar in

09:24:44 25

Clewiston, Florida, correct?

Cagle - cross

09:24:51 1 A. That's my understanding, yes.

09:24:52 2 Q. And Clewiston, Florida is approximately 750 miles
09:24:56 3 away from your facility in North Carolina; correct, sir?

09:25:01 4 A. That sounds right.

09:25:02 5 Q. And since obviously as you said it's better that
09:25:07 6 companies -- that you know that the companies are closer
09:25:10 7 from a freight perspective because that would get you your
09:25:14 8 more competitive price, if you can tell me how many
09:25:17 9 companies are located closer to your facility than U.S.
09:25:24 10 Sugar's facility in Clewiston, correct, sir?

09:25:27 11 A. I'm sure there are companies that are closer than
09:25:31 12 that.

09:25:31 13 Q. We talked about this during your deposition, do you
09:25:34 14 remember?

09:25:34 15 A. Yes.

09:25:35 16 Q. And there are actually a dozen sugar suppliers that
09:25:41 17 sell sugar that are located closer to the -- to you than the
09:25:49 18 facility in Clewiston, Florida; correct, sir?

09:25:51 19 A. I don't know if twelve is the number, but it sounds
09:25:56 20 about right.

09:25:58 21 Q. And it's true, sir, that of those dozen, there are
09:26:04 22 companies, most of those companies you have never spoken to?

09:26:09 23 A. Me personally?

09:26:10 24 Q. Yes.

09:26:12 25 A. Correct.

Cagle - cross

09:26:11 1 Q. And you have no idea what prices they would have
09:26:16 2 charged you or offered to sell sugar to you for, correct,
09:26:19 3 sir?

09:26:20 4 A. That's correct.

09:26:20 5 Q. And the reason you don't know is because you didn't
09:26:24 6 reach out to them because it's your view that if they had
09:26:28 7 the sugar to sell you, well, they should reach out to you
09:26:33 8 and try to solicit your business, correct, sir?

09:26:40 9 A. Correct.

09:26:44 10 Q. You're aware that there is a company called Atlantic
09:26:49 11 Ingredients that's located 76 miles from your facility in
09:26:52 12 Lexington, North Carolina, correct?

09:26:55 13 A. That sounds correct.

09:26:57 14 Q. You're only aware of it because I told you about it
09:27:02 15 during your deposition?

09:27:02 16 A. Yes.

09:27:03 17 Q. And you never have reached out to them?

09:27:05 18 A. No.

09:27:05 19 Q. You're familiar with a company called Archer Daniels
09:27:10 20 Midland, correct?

09:27:10 21 A. Yes.

09:27:10 22 Q. ADM?

09:27:11 23 A. Yes.

09:27:12 24 Q. And you know that they sell refined sugar; right?

09:27:14 25 A. Yes.

Cagle - cross

09:27:15 1 Q. You know that they have a facility in Chattanooga,
09:27:20 2 correct?

09:27:20 3 A. Yes.

09:27:20 4 Q. And they also have a facility in Lakewood, New York?

09:27:23 5 A. I don't know about New York.

09:27:24 6 Q. But the Chattanooga, Tennessee facility is only
09:27:29 7 340 miles from Lexington, correct?

09:27:31 8 A. It sounds about right.

09:27:33 9 Q. You never reached out to them to find out if they
09:27:35 10 could sell you sugar?

09:27:36 11 A. Me personally, no.

09:27:40 12 Q. You're familiar with a company called Batory?

09:27:45 13 A. Batory Foods.

09:27:47 14 Q. And they sell refined sugar, don't they?

09:27:49 15 A. I'm not aware that they sell refined sugar, but they
09:27:52 16 may.

09:27:53 17 Q. You're not even aware that Batory Foods sells refined
09:27:57 18 sugar, that's your testimony?

09:27:58 19 A. Correct.

09:27:59 20 Q. Okay. Are you familiar with a company called Sucden?

09:28:00 21 A. No.

09:28:02 22 Q. You don't know whether they sell refined sugar?

09:28:10 23 A. I'm not aware of the company.

09:28:15 24 Q. Now, despite what you know and don't know about your
09:28:20 25 competitive options, you aren't aware of any impediments

Cagle - cross

09:28:26 1 that would prevent Piedmont from obtaining bids from any of
09:28:30 2 the companies that I mentioned in the event that US Sugar's
09:28:33 3 acquisition of Imperial went through, correct, sir?

09:28:36 4 A. I am not aware of any.

09:28:38 5 Q. In fact, you testified that if Piedmont wanted to
09:28:42 6 swap out some of the companies that it currently requests
09:28:44 7 bids from for some of those other companies at a later date,
09:28:48 8 that Piedmont could do that?

09:28:51 9 A. Correct.

09:28:51 10 Q. So now, I would like to talk about something else.
09:28:51 11 Let's put JTX 26 on the screen. And let's put the redacted
09:29:01 12 -- perfect.

09:29:01 13 And sir, JTX 26, this is a document that
09:29:11 14 reflects the set of communications that you had with
09:29:11 15 representatives of various competitors that you were
09:29:11 16 soliciting sugar bids from, correct, sir?

09:29:21 17 A. Yes.

09:29:21 18 Q. And if we look at this document, we see that you were
09:29:21 19 speaking with representatives of [REDACTED]
09:29:31 20 [REDACTED] and [REDACTED], correct, sir?

09:29:31 21 A. That's correct.

09:29:31 22 Q. And we haven't mentioned Evergreen yet, but it's
09:29:41 23 another distributor, correct?

09:29:41 24 A. Yes.

09:29:41 25 Q. And Evergreen was seeking to supply Piedmont with

Cagle - cross

09:29:45 1 invert sugar, correct?

09:29:47 2 A. That's correct.

09:29:49 3 Q. And invert sugar is part of the government's alleged
09:29:52 4 market in this case, but actually -- sorry, I should take
09:29:55 5 that back, it's not, because Evergreen is a distributor so
09:29:58 6 it's out. But let me ask you this, sir.

09:30:01 7 It looks like you were speaking with [REDACTED]
09:30:04 8 [REDACTED] and [REDACTED] all around June 16th, do you see that?

09:30:10 9 A. Yes.

09:30:11 10 Q. And these reflect the notes of your conversations,
09:30:14 11 correct?

09:30:14 12 A. Yes.

09:30:15 13 Q. You made these notes in the ordinary course of your
09:30:18 14 business?

09:30:18 15 A. Yes.

09:30:19 16 Q. And it was your regular practice to make notes of
09:30:21 17 these conversations, correct?

09:30:21 18 A. This year -- this particular year, I took, I think
09:30:24 19 this was one of the first years I did it, so I took copious
09:30:27 20 notes. I think from that point forward, my notes weren't
09:30:30 21 nearly as detailed.

09:30:32 22 Q. When you were doing this, you were trying to take
09:30:35 23 copious notes, correct?

09:30:36 24 A. Trying to.

09:30:38 25 Q. And these were made around the time of these

Cagle - cross

09:30:47 1 **conversations, correct?**

09:30:48 2 A. **Yes.**

09:30:48 3 Q. **And they constitute your recorded recollections of**
09:30:54 4 **those conversations, correct?**

09:30:55 5 A. **Correct.**

09:30:57 6 **MR. BUTERMAN: Your Honor, I would like to move**
09:30:58 7 **for the admission of JTX 26.**

09:31:02 8 **THE COURT: Any objection?**

09:31:03 9 **MS. SINKLER: No, Your Honor.**

09:31:04 10 **THE COURT: Thank you. It's admitted.**

09:31:04 11 **(JTX Exhibit No. 26 was admitted into evidence.)**

09:31:04 12 **BY MR. BUTERMAN:**

09:31:10 13 Q. **Now, sir, let's start with Imperial Sugars. Do you**
09:31:10 14 **see that?**

09:31:20 15 A. **Yes, sir.**

09:31:20 16 Q. **And what Imperial Sugars tells you on June 16th is**
09:31:20 17 **that they don't have a percentage book to give you at this**
09:31:30 18 **point. Do you see that, sir?**

09:31:30 19 A. **Yes.**

09:31:30 20 Q. **But they say that they have seen a lot of inquiries,**
09:31:30 21 **correct?**

09:31:30 22 A. **Yes.**

09:31:40 23 Q. **And when they say they don't have a percentage**
09:31:40 24 **booked, you understand that to be their sold position that**
09:31:50 25 **they're referring to; correct, sir?**

Cagle - cross

09:31:54 1 A. Correct.

09:31:55 2 Q. And that's something that you had asked them about?

09:31:59 3 A. Right, I would ask them how much of their business

09:32:02 4 had they booked so far this year.

09:32:04 5 Q. And they gave that information to you?

09:32:07 6 A. They said things like this. We have not booked much

09:32:13 7 to this point.

09:32:14 8 Q. And if we look at the next line, you also talked to

09:32:18 9 them about the hurricane season starting?

09:32:23 10 A. These were some comments as far as I could recollect

09:32:27 11 that they stated during our conversation to me.

09:32:29 12 Q. Right.

09:32:30 13 Now, this is from June 16th, 2020. Who was

09:32:35 14 supplying you with sugar at this point in time?

09:32:38 15 A. I think it was [REDACTED]

09:32:40 16 Q. Okay. And [REDACTED] they don't sell beet sugar, do

09:32:41 17 they?

09:32:51 18 A. As far as I know, correct.

09:32:53 19 Q. And you don't even take beet sugar?

09:32:56 20 A. Correct.

09:32:57 21 Q. Okay. But you're having the conversation with them

09:33:01 22 where they're talking about beet plant growth, correct, sir?

09:33:02 23 A. They are talking about it, yes.

09:33:08 24 Q. In connection with a conversation about pricing for

09:33:15 25 2021?

Cagle - cross

09:33:16 1 A. Correct.

09:33:17 2 Q. This cane refiner is talking to you about beet

09:33:21 3 pricing; correct?

09:33:23 4 A. That's correct.

09:33:23 5 Q. And that's because those prices for beet sugar, that

09:33:28 6 affects the cane prices, correct, sir?

09:33:33 7 A. I don't know if I would phrase it that the pricing of

09:33:38 8 the beet affects the cane. My understanding is more that if

09:33:41 9 they have trouble with the beet plantings, that could cause

09:33:45 10 a problem with the cane plantings. If the beets, I hear

09:33:50 11 them say things like if the beet crop comes in late, maybe

09:33:55 12 that means it's going to affect the cane crop which could

09:34:00 13 cause the price to go up.

09:34:01 14 Q. To be clear, that beet sugar, that's sugar that you

09:34:04 15 know is produced in the Red River Valley, states like

09:34:08 16 Michigan, Montana, Wyoming, North Dakota, and Minnesota,

09:34:13 17 correct, sir?

09:34:14 18 A. Correct.

09:34:14 19 Q. About a thousand miles or so away from Lexington,

09:34:18 20 North Carolina where Piedmont is?

09:34:20 21 A. Sounds about right.

09:34:24 22 Q. But you would agree that the reality of what happens

09:34:28 23 up there in beet country, that can have an effect on the

09:34:31 24 prices that you are going to be receiving down in Lexington

09:34:32 25 North Carolina, correct?

Cagle - cross

09:34:38 1 A. Correct.

09:34:38 2 Q. Now we also see that you spoke with -- you also spoke

09:34:45 3 with Julie Campbell, correct, from United?

09:34:48 4 A. Correct.

09:34:48 5 Q. And when you spoke with Ms. Campbell, she was also

09:34:56 6 talking to you about what was going on in the market with

09:35:02 7 respect to beets; correct?

09:35:05 8 A. Correct.

09:35:05 9 Q. She was talking to you about the beet freeze?

09:35:07 10 A. Correct.

09:35:08 11 Q. And the force majeure that companies like United had

09:35:11 12 to declare as a result?

09:35:13 13 A. Correct.

09:35:13 14 Q. She also talked about other issues like how the beet

09:35:17 15 crops and cane crops of United's other members were coming

09:35:20 16 in, correct, sir?

09:35:21 17 A. Correct.

09:35:21 18 Q. And she told you where she saw prices coming in in

09:35:24 19 2021 as opposed to 2020, right?

09:35:24 20 A. Yes.

09:35:24 21 Q. She also discussed with you in connection with this

09:35:32 22 pricing discussion the role of the USDA and the fact that

09:35:32 23 they could bring in more volume if crops were down or demand

09:35:40 24 was higher, right?

09:35:42 25 A. Correct.

Cagle - cross

09:35:41 1 Q. And she also shared with you that United's sold
09:35:45 2 position was 60 percent for 2021, correct, sir?

09:35:48 3 A. Correct.

09:35:49 4 Q. And she explained that that's higher than usual, but
09:35:53 5 she said that there was no urgency to lock in a contract
09:35:57 6 price because she wasn't seeing anything that could cause
09:36:00 7 prices to go up?

09:36:01 8 A. Correct.

09:36:02 9 Q. You also spoke with somebody from Domino, correct?

09:36:04 10 A. Yes.

09:36:05 11 Q. And again, Domino doesn't make beet sugar, do they?

09:36:08 12 A. Not that I'm aware of.

09:36:09 13 Q. And you don't buy beet sugar?

09:36:12 14 A. Correct.

09:36:12 15 Q. But as part of your pricing discussions with them,
09:36:15 16 you're talking about the beet crop and the effects of the
09:36:18 17 beet crop, right?

09:36:19 18 A. They are.

09:36:20 19 Q. And you're writing it down as part of your attempt to
09:36:23 20 take copious notes of what's important about your pricing
09:36:26 21 conversations with them?

09:36:28 22 A. Correct.

09:36:29 23 Q. And what Domino tells you, in fact, is that in 2021,
09:36:42 24 there should be better prices than 2020 because the beet
09:36:45 25 crop is going to be better. Correct, sir?

Cagle - cross

09:36:50 1 A. Correct.

09:36:51 2 Q. So what Domino told you was that the prices that you
09:36:55 3 were going to receive in 2021 for your cane sugar was going
09:37:01 4 to be better because of something that was happening up
09:37:06 5 north a thousand miles away with respect to the beet crop;
09:37:09 6 correct, sir?

09:37:10 7 A. Correct.

09:37:13 8 Q. Quickly, if we look at Indiana, you spoke to Indiana.
09:37:22 9 And Indiana mentioned to you that they believe that prices
09:37:26 10 would come down once the July report came out, do you see
09:37:31 11 that?

09:37:31 12 A. Yes.

09:37:31 13 Q. And the WASDE, that's the World Agriculture Supply
09:37:40 14 Demand Estimates for the USDA, right?

09:37:41 15 A. Correct.

09:37:41 16 Q. So what Indiana tells you is once the USDA puts out
09:37:48 17 those estimates, you're going to see initial pricing coming
09:37:52 18 in for imports, and those import prices were going to cause
09:37:55 19 the prices to come down.

09:37:56 20 A. That's what they thought was going to happen.

09:37:57 21 Q. If we look quickly at Evergreen, Evergreen also
09:38:04 22 talked to about the USDA and they said that the USDA was
09:38:08 23 keeping sugar supply tight because the last thing that they
09:38:11 24 wanted was sugar to be forfeited, correct, sir?

09:38:14 25 A. Correct.

Cagle - cross

09:38:14 1 Q. And so what Evergreen was telling you was that but
09:38:18 2 for the USDA's action, the price of sugar would have been
09:38:22 3 lower?

09:38:25 4 A. Yes, that's what they were saying.

09:38:27 5 Q. And sir, in none of these conversations with any of
09:38:31 6 these entities did any of them mention competition in the
09:38:38 7 southeast and the effect of that competition on prices, did
09:38:42 8 they?

09:38:43 9 A. Not in those conversations.

09:38:50 10 Q. By the way, just looking back at Domino, there was
09:38:52 11 one thing I neglected to mention. Domino also told you, a
09:38:57 12 potential customer, what their sold position was for 2021;
09:39:02 13 correct, sir?

09:39:05 14 A. A potential vendor, Domino, they were saying that
09:39:10 15 they had a fifty percent booked for 2021.

09:39:12 16 Q. And sir, unlike all those exhibits that we looked at
09:39:18 17 earlier, we're doing this in the open court because you
09:39:24 18 didn't believe that any of the companies' sold positions was
09:39:29 19 competitively sensitive, correct, sir?

09:39:32 20 A. Correct.

09:39:34 21 MR. BUTERMAN: No further questions, Your Honor.

09:39:35 22 THE COURT: All right. Thank you.

09:39:37 23 Ms. Sinkler, redirect.

09:39:39 24 MS. SINKLER: Thank you, Your Honor.

09:39:42 25 REDIRECT EXAMINATION

Cagle - redirect

09:39:45 1 BY MS. SINKLER:

09:39:47 2 Q. Mr. Cagle, I want to ask you first about PTX 220,
09:39:55 3 which can't be displayed on the public screen. I'm going to
09:39:59 4 try to ask you in such a way not to close the courtroom
09:40:03 5 again, but you were asked about PTX 220. Do you see that in
09:40:09 6 your binder?

09:40:09 7 A. Your binder --

09:40:11 8 Q. It's in the defendant's binder.

09:40:16 9 A. Yes.

09:40:16 10 Q. And page 961, the page ending in 961. Do you see
09:40:25 11 that?

09:40:25 12 A. Yes.

09:40:25 13 Q. And opposing counsel asked you about when you were
09:40:28 14 speaking with Ms. Campbell and mentioning other vendors. Do
09:40:34 15 you recall that?

09:40:34 16 A. Yes.

09:40:35 17 Q. Did you mention any distributors by name when you
09:40:40 18 were speaking with Ms. Campbell about other vendors in PTX
09:40:46 19 220?

09:40:47 20 A. No.

09:40:48 21 Q. Mr. Cagle, is your company pretty knowledgeable about
09:40:51 22 how to make the candy that you make?

09:40:54 23 A. Yes.

09:40:55 24 Q. Do you know the ingredient your competitors use to
09:40:55 25 make their products?

Cagle - redirect

09:41:01 1 A. I can read the back of package of what the
09:41:05 2 ingredients are, but as far as firsthand knowledge, no.

09:41:10 3 Q. How is sugar delivered to Piedmont Candy?

09:41:13 4 A. Tractor trailer.

09:41:14 5 Q. Is it possible that some of that sugar comes in via a
09:41:19 6 railcar and then is put on a tractor trailer to bring to
09:41:23 7 you?

09:41:23 8 A. Yes, it's possible.

09:41:27 9 Q. Do you spend your time as CEO researching every
09:41:31 10 possible company that could supply you with sugar?

09:41:31 11 A. CFO.

09:41:37 12 Q. I'm sorry. CFO.

09:41:41 13 THE COURT: She gave you a promotion.

09:41:44 14 A. Could you repeat the question?

09:41:46 15 Q. Yes.

09:41:46 16 Do you spend your time as CFO researching every
09:41:51 17 possible company that could supply you with sugar?

09:41:52 18 A. No.

09:41:53 19 Q. Why not?

09:41:53 20 A. I don't have the time to do that. I have other
09:41:57 21 responsibilities.

09:41:58 22 Q. I'm sorry, Mr. Cagle?

09:41:58 23 A. I have other responsibilities.

09:42:00 24 Q. Do you try your best to get the lowest price of sugar
09:42:00 25 for your company?

Cagle - redirect

09:42:08 1 A. Yes.

09:42:09 2 Q. And finally, Mr. Cagle, who are the cane refiners in
09:42:13 3 the southeast located near you?

09:42:18 4 A. It would be refineries, United and Imperial are the
09:42:23 5 main ones that I am aware of.

09:42:26 6 MS. SINKLER: Thank you, Mr. Cagle. No further
09:42:28 7 questions, Your Honor.

09:42:29 8 THE COURT: All right. Thank you. All right.
09:42:31 9 Thank you, sir. You are excused.

09:42:31 10 What's next?

09:42:37 11 MR. WOLIN: Your Honor, I think we're --
09:42:41 12 Mr. Blumenfeld mentioned --

09:42:44 13 THE COURT: Mr. Sproull.

09:42:46 14 MR. WOLIN: I think we're going to let the
09:42:48 15 defendants call Mr. Sproull out of order.

09:42:51 16 THE COURT: Okay. Are you calling Mr. Sproull,
09:42:58 17 Mr. Buterman?

09:43:01 18 MR. BUTERMAN: Yes, Your Honor. Mr. Yates.

09:43:03 19 THE COURT: You're on the clock.

09:43:04 20 MR. BUTERMAN: We understand.

09:43:40 21 COURT CLERK: Please raise your right hand.
09:43:45 22 Please state and spell your full name for the record.

09:43:50 23 THE WITNESS: Robert Thomas Sproull,

09:43:52 24 R-O-B-E-R-T, T-H-O-M-A-S, S-P-R-O-U-L-L.

09:43:52 25 ROBERT THOMAS SPROULL, having been duly sworn,

Sproull - direct

09:44:07 1 was examined and testified as follows:

09:44:07 2 THE WITNESS: Good morning.

09:44:09 3 DIRECT EXAMINATION

09:44:09 4 BY MR. YATES:

09:44:09 5 Q. Good morning, Mr. Sproull.

09:44:11 6 A. Good morning.

09:44:11 7 Q. Mr. Sproull, who is your current employer?

09:44:13 8 A. American Sugar Refining, Inc.

09:44:15 9 Q. Also known as Domino?

09:44:17 10 A. ASR Group is probably the also known as, Domino Foods
09:44:21 11 is the organization that I manage.

09:44:23 12 Q. Mr. Sproull, what's Domino's business?

09:44:26 13 A. We are in the sugar refining business, primarily.

09:44:29 14 Q. What's your title, sir?

09:44:31 15 A. Senior vice-president of sales, marketing and product
09:44:33 16 development.

09:44:35 17 Q. Who do you report to?

09:44:38 18 A. Luis Fernandez and Antonio Contreras.

09:44:39 19 Q. What are their titles?

09:44:41 20 A. They are co-presidents of the ASR Group.

09:44:43 21 Q. Sir, other than the co-presidents, do you have
09:44:45 22 ultimate responsibility for refined sugar sales at Domino?

09:44:50 23 A. For the geographies of the United States and Canada,
09:44:52 24 I do, yes.

09:44:54 25 Q. Where are Domino Sugar refineries in the United

Sproull - direct

09:44:59 1 States located?

09:44:59 2 A. We have, ASR has refineries in Crockett, California;
09:45:05 3 Chalmette, Louisiana; Baltimore, Maryland; and Yonkers, New
09:45:10 4 York; and then we produce Domino's sugar from the facility
09:45:15 5 in Okeelanta, Florida.

09:45:15 6 Q. For each of those refineries that you mentioned does
09:45:18 7 Domino only sell the sugar in a state in which the refinery
09:45:23 8 is located?

09:45:24 9 A. No, it does not.

09:45:25 10 Q. For each of those refineries, does Domino only sell
09:45:30 11 the sugar in the states that border the state that contains
09:45:31 12 the refinery?

09:45:31 13 A. No, that's not the case.

09:45:37 14 Q. Are you aware, sir, that Domino produced its sales
09:45:40 15 data in response to a subpoena from the government in the
09:45:45 16 case?

09:45:45 17 A. I am, I was part of that.

09:45:47 18 Q. Let's take a look at DTX 517. It's in your binder.
09:45:51 19 It's in the defendant's binder, the one with the US Sugar
09:45:57 20 logo on it, sir.

09:45:58 21 A. Give me the number again, please.

09:46:00 22 Q. Sure. DTX 517.

09:46:02 23 A. 517. Okay.

09:46:02 24 Q. And this has been redacted. I'm not going to display
09:46:02 25 it on the public record, sir.

Sproull - direct

09:46:11 1 To the best of your knowledge, sir, does this
09:46:15 2 appear to be an accurate summary of the volumes of refined
09:46:18 3 sugar that Domino sold in each state in the United States in
09:46:22 4 2021?

09:46:28 5 A. Yeah, I don't -- I don't manage the business on a
09:46:33 6 state by state basis, but yeah, it looks reasonable.

09:46:37 7 MR. YATES: Your Honor, I would like to move DTX
09:46:40 8 517 into evidence.

09:46:40 9 THE COURT: Any objection?

09:46:43 10 MR. WOLIN: No, Your Honor.

09:46:44 11 THE COURT: It's admitted.

09:46:44 12 (DTX Exhibit No. 517 was admitted into
09:46:44 13 evidence.)

09:46:44 14 BY MR. YATES:

09:46:45 15 Q. Mr. Sproull, how many states did Domino sell refined
09:46:51 16 sugar into in 2021?

09:46:52 17 A. I would assume all fifty.

09:46:53 18 Q. Let's take a look at a demonstrative, DDX 002. All
09:47:04 19 right. This shows the Continental United States. Is it
09:47:07 20 true that Domino sold refined sugar in each of the
09:47:12 21 forty-eight states in the Continental United States over the
09:47:14 22 past four years?

09:47:17 23 A. I'm sure.

09:47:18 24 Q. You're sure it is?

09:47:19 25 A. Yes.

Sproull - direct

09:47:20 1 Q. Okay. And that's from the five refineries that
09:47:24 2 Domino operates in the states that you mentioned earlier,
09:47:27 3 sir?

09:47:28 4 A. That's correct.

09:47:33 5 Q. Let's take a look at where those refineries are
09:47:37 6 located so we can see it on the map. There is one in
09:47:40 7 Crockett, California, there is one in Chalmette, Louisiana,
09:47:43 8 there is one in Okeelanta, Florida, there is one in
09:47:47 9 Baltimore, Maryland, and one in Yonkers, New York?

09:47:50 10 A. Correct.

09:47:50 11 Q. And Domino ships throughout the United States from
09:47:53 12 these five refineries and sells to customers in all
09:47:58 13 forty-eight Continental United States from those five
09:48:00 14 refineries, correct?

09:48:01 15 A. Yes, that's correct.

09:48:02 16 Q. Does Domino -- let's take a look at DTX -- take a
09:48:06 17 look back at DTX 517, sir.

09:48:12 18 A. Okay.

09:48:18 19 Q. Do you see that there is a certain volume of sugar
09:48:21 20 that is being shipped and sold by Domino into the state of
09:48:26 21 Illinois?

09:48:27 22 A. Yes.

09:48:28 23 Q. Okay. And that's one of the top ten largest states
09:48:32 24 by volume for Domino, correct?

09:48:35 25 A. That's correct, yes.

Sproull - direct

09:48:36 1 Q. Okay, Domino doesn't operate a refinery in Illinois,
09:48:41 2 does it?

09:48:41 3 A. No, not a refinery.

09:48:43 4 Q. And in DTX 517, take a look at page 3, sir.

09:48:50 5 A. Okay.

09:48:50 6 Q. Do you see that it says ASR Domino sales by state,
09:48:56 7 sugar produced at Chalmette, Louisiana?

09:48:59 8 A. Yes.

09:49:00 9 Q. What do you understand the table on page 3 of DTX 517
09:49:05 10 to show?

09:49:05 11 A. These would be amounts of sugar sold by state from
09:49:09 12 the refinery in New Orleans.

09:49:12 13 Q. And let's take a look at slide 3 on our
09:49:16 14 demonstrative. Does slide 3 of our demonstrative show the
09:49:21 15 top ten states for sales of refined sugar from that refinery
09:49:26 16 in Chalmette, Louisiana?

09:49:31 17 A. Yeah, it looks accurate.

09:49:36 18 Q. And Chalmette is near New Orleans?

09:49:39 19 A. Yes.

09:49:42 20 Q. As depicted on the map, correct?

09:49:47 21 A. Correct.

09:49:49 22 Q. So the top ten states from Chalmette range from Texas
09:49:54 23 to Pennsylvania to New Jersey to Virginia to Illinois,
09:49:59 24 correct?

09:49:59 25 A. That's right.

Sproull - direct

09:49:55 1 Q. Now, Domino also has a refinery in Baltimore,
09:49:59 2 Maryland, correct?

09:50:00 3 A. Correct.

09:50:00 4 Q. Let's take a look at the next slide. That shows you
09:50:04 5 where that refinery is, sir?

09:50:06 6 A. Yes.

09:50:06 7 Q. And even though Domino has got a refinery in
09:50:10 8 Baltimore, Maryland, Pennsylvania and New Jersey are among
09:50:14 9 the top ten states for sales by volume from the Chalmette,
09:50:19 10 Louisiana refinery, correct?

09:50:21 11 A. That's right.

09:50:25 12 Q. Is shipping refined sugar a shorter distance always
09:50:31 13 cheaper than shipping sugar a longer distance?

09:50:35 14 A. I think as general a rule shipping further costs
09:50:38 15 more, but not always the case, different shipping lanes,
09:50:43 16 railways, they have different costs and sometimes it can be
09:50:46 17 less expensive to go further in terms of miles.

09:50:48 18 Q. And ASR Domino chooses to ship sugar from all the way
09:50:51 19 from Chalmette, Louisiana up to customers in Pennsylvania
09:50:54 20 and New Jersey, correct?

09:50:58 21 A. Yes, we do.

09:50:59 22 Q. Let's take a look at page 5 of DTX 517, sir. Do you
09:51:02 23 see that?

09:51:07 24 A. I do.

09:51:09 25 Q. That's a table with Domino sales by state from

Sproull - direct

09:51:12 1 Okeelanta, Florida refinery?

09:51:16 2 A. That's correct.

09:51:17 3 Q. Let's take a look at slide 5 on the demonstratives.

09:51:20 4 Does slide 5 represent the top ten states by volume for
09:51:27 5 sales from the Okeelanta, Florida refinery?

09:51:31 6 A. It looks like a match to me, yes.

09:51:33 7 Q. And among the top ten states for sales by volume from
09:51:37 8 Okeelanta, Texas, Illinois, Ohio, Pennsylvania, and even New
09:51:44 9 York, correct?

09:51:45 10 A. Correct.

09:51:48 11 Q. And does ASR sell more refined sugar into New York or
09:52:02 12 Alabama from its Okeelanta, Florida refinery, sir?

09:52:08 13 A. Well, it appears New York. And that would be
09:52:11 14 consistent with my understanding.

09:52:12 15 Q. And, in fact, ASR sells three times as much sugar
09:52:16 16 into New York as it does into Alabama which is a state that
09:52:20 17 touches Florida, correct?

09:52:21 18 A. Yes.

09:52:25 19 Q. Mr. Sproull, can you take a look at DTX 043. And
09:52:32 20 we're not going to display this on the public screen. This
09:52:37 21 is another confidential document.

09:52:40 22 A. Okay. I'm there.

09:52:42 23 Q. Would you please tell me what the attachment to this
09:52:45 24 e-mail is?

09:52:47 25 A. This is a document that was a strategic review of our

Sproull - direct

09:52:58 1 business in the northeast, northeast United States.

09:53:02 2 Q. And was DTX 043 prepared in the ordinary course of

09:53:07 3 ASR's business, sir?

09:53:09 4 A. Yes.

09:53:10 5 Q. And you received and reviewed DTX 043 in the ordinary
09:53:14 6 course of your job duties?

09:53:15 7 A. Yes.

09:53:17 8 MR. YATES: Your Honor, I move DTX 043 into
09:53:20 9 evidence.

09:53:21 10 MR. WOLIN: No objection.

09:53:21 11 THE COURT: Thank you, it's admitted.

09:53:21 12 (DTX Exhibit No. 043 was admitted into
09:53:25 13 evidence.)

09:53:25 14 BY MR. YATES:

09:53:25 15 Q. I would ask you to turn to slide 6. It's got the
09:53:29 16 Bates number 463 on it, sir.

09:53:31 17 A. Okay.

09:53:31 18 Q. Actually let's look at slide 5. They're the same, I
09:53:37 19 think. Is this a map that Domino's executive committee
09:53:42 20 relied on in the normal course of its business?

09:53:42 21 A. Yes, it would be something we would look at.

09:53:42 22 Q. And you're on Domino's executive committee, correct?

09:53:52 23 A. I am.

09:53:52 24 Q. And do you see the states that are encompassed by the
09:53:52 25 dotted line that is labeled in this Domino presentation as

Sproull - direct

09:54:01 1 the south?

09:54:02 2 A. Yes.

09:54:03 3 Q. And the south encompasses states ranging from Florida
09:54:07 4 to Texas to Tennessee to Arkansas in this ASR ordinary
09:54:13 5 course document, correct?

09:54:14 6 A. That's correct.

09:54:15 7 Q. And what states are the Midatlantic states in this
09:54:21 8 ASR ordinary course document, sir?

09:54:23 9 A. Looks like the Carolinas.

09:54:24 10 Q. So North and South Carolina, correct?

09:54:28 11 A. Correct.

09:54:29 12 Q. And then it looks like Virginia up through Maine is
09:54:34 13 labeled northeast in this document; is that right?

09:54:36 14 A. That's right.

09:54:37 15 Q. So ASR places Virginia and Maryland and Delaware in
09:54:42 16 the northeast in its ordinary course of business documents,
09:54:45 17 correct?

09:54:46 18 A. Yes.

09:54:47 19 Q. Mr. Sproull, do you have a graduate degree?

09:54:51 20 A. I do.

09:54:52 21 Q. What's your graduate degree in, sir?

09:54:52 22 A. I have a masters in business administration.

09:54:52 23 Q. From what institution?

09:54:52 24 A. From MIT.

09:55:02 25 Q. Okay. And before you joined Domino, were you a

Sproull - direct

09:55:05 1 **business consultant?**

09:55:06 2 A. I was.

09:55:06 3 Q. At Deloitte?

09:55:07 4 A. That is correct.

09:55:07 5 Q. And was part of your job at Deloitte trying to make
09:55:11 6 other businesses more competitive?

09:55:12 7 A. It was.

09:55:14 8 Q. Does any part of your job at Domino involve helping
09:55:18 9 Domino increase its competitiveness in the sale of refined
09:55:22 10 sugar?

09:55:22 11 A. Yes, absolutely.

09:55:24 12 Q. If U.S. Sugars acquires Imperial Sugar, do you intend
09:55:29 13 to stop working every day to make Domino competitive in its
09:55:33 14 efforts to sell refined sugar?

09:55:35 15 A. No, of course not.

09:55:37 16 Q. If US Sugar acquires Imperial Sugar, do you expect
09:55:41 17 that you'll continue trying to win as much business as
09:55:45 18 possible for Domino?

09:55:46 19 A. Well, I can only say my job is not to win as much
09:55:50 20 business but as to make the highest return to my shareholder
09:55:52 21 base.

09:55:52 22 Q. Fair enough. How would you characterize the degree
09:55:53 23 of competition for the sale of refined sugar in the United
09:56:00 24 States?

09:56:02 25 A. It's based on my experience in other industries, it's

Sproull - direct

09:56:07 1 intense.

09:56:07 2 Q. Who are the companies that you can recall sitting
09:56:10 3 here today that Domino competes with for the sale of refined
09:56:14 4 sugar in the United States?

09:56:15 5 A. Well, it would be US Sugar, it would be Imperial, it
09:56:18 6 would be LSR Cargill, United with the Red River Valley beets
09:56:24 7 production, Michigan Sugar, National Sugar Marketing,
09:56:28 8 Mexican sugar coming in, imported Tier II sugar coming in.
09:56:35 9 Melt houses.

09:56:36 10 Q. You mention melt houses. What are they?

09:56:36 11 A. They're not core sugar refiners. They buy some type
09:56:41 12 of sucrose, some of it is refined, some of it is raw, some
09:56:41 13 of it is something in between and they produced the liquid
09:56:51 14 sugar from that.

09:56:51 15 Q. Have you heard of a company called Indiana Sugar?

09:56:56 16 A. Yes.

09:56:56 17 Q. Did you compete against them?

09:56:56 18 A. We both sell to them and compete against them.

09:57:01 19 Q. To your knowledge has Domino lost sales to industrial
09:57:02 20 customers to Indiana Sugar?

09:57:02 21 A. Sure.

09:57:10 22 Q. Sir, over the past five years, have you observed any
09:57:12 23 changes in the amount of competition of the sale of refined
09:57:12 24 sugar in the United States?

09:57:12 25 A. Yeah, easily, it's a year to year, it's a month to

Sproull - direct

09:57:22 1 month, it absolutely changes.

09:57:24 2 Q. What have you observed over the last five years, have
09:57:27 3 you observed any new entrants?

09:57:30 4 A. There are always people growing capacity, there are
09:57:33 5 people, it's an agricultural business so you have different
09:57:37 6 regions increasing their crop sizes. As we've talked about,
09:57:41 7 the melt houses and CSC is one of those, they have added new
09:57:46 8 facilities in the last few years.

09:57:53 9 MR. YATES: At this point, Your Honor, I think
09:57:54 10 we're going to have to seal the courtroom for the remainder
09:57:57 11 of the testimony.

09:57:58 12 THE COURT: Okay. Given that it's sensitive
09:58:01 13 business information for a third party, here, ASR, we'll
09:58:04 14 close the courtroom.

09:58:07 15 (Courtroom sealed.)

09:58:10 16 MR. YATES: While we're waiting, Mr. Sproull,
09:58:13 17 could you pull up DTX 094.

09:58:20 18 THE WITNESS: Sure.

09:58:23 19 THE COURT: I think everyone is gone.

09:58:26 20 MR. YATES: Thank you, Your Honor.

09:58:29 21 BY MR. YATES:

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Sproull - direct

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MR. YATES: Thank you. No further questions,
Your Honor.

THE COURT: Thank you.

Mr. Wolin, cross-exam. And are you going to
need to keep the courtroom still sealed for the beginning of
this?

MR. WOLIN: No, Your Honor. We can open the
courtroom up.

THE COURT: All right. We can open the
courtroom.

(Courtroom unsealed.)

MR. WOLIN: Your Honor, Michael Wolin on behalf

Sproull - cross

10:11:22 1 of the plaintiff, United States. May I proceed?

10:11:25 2 THE COURT: Yes.

10:11:25 3 CROSS-EXAMINATION

10:11:25 4 BY MR. WOLIN:

10:11:27 5 Q. Good morning, Mr. Sproull. It's nice to talk to you.

10:11:30 6 A. Good to see you.

10:11:31 7 Q. We spoke a few minutes ago about U.S. sales of sugar
10:11:37 8 to industrial customers. Do you recall that?

10:11:38 9 A. Yes.

10:11:38 10 Q. ASR markets sugar under the brand name Domino,
10:11:42 11 correct?

10:11:42 12 A. That's one of our major brands.

10:11:44 13 Q. ASR industrial customers will often solicit bids from
10:11:50 14 multiple sugar suppliers; is that correct?

10:11:52 15 A. Yes.

10:11:53 16 Q. And ASR in return responds with a bid price, right?

10:11:54 17 A. Yes.

10:11:54 18 Q. And ASR considers transportation costs when deciding
10:12:00 19 what bid to submit, correct?

10:12:01 20 A. We do.

10:12:02 21 Q. And ASR also sometimes considers transportation costs
10:12:07 22 when deciding whether to submit a bid at all, correct?

10:12:10 23 A. I think so, yes.

10:12:12 24 Q. And when submitting a bid, ASR sometimes does an
10:12:16 25 assessment of who the likely competitors are for that

Sproull - cross

10:12:18 1 customer, correct?

10:12:19 2 A. Yes, we do.

10:12:20 3 Q. And the location of the customer is one factor that
10:12:24 4 impacts the assessment of who the likely competitors would
10:12:27 5 be, correct?

10:12:27 6 A. It is.

10:12:28 7 Q. Now, you mentioned that ASR sells cane sugar,
10:12:33 8 correct?

10:12:33 9 A. Yes.

10:12:34 10 Q. Some of ASR's customers express a preference for cane
10:12:38 11 sugar over beet sugar, correct?

10:12:40 12 A. Some.

10:12:41 13 Q. And for those customers that express that preference,
10:12:45 14 they're willing to pay a small premium for cane sugar over
10:12:49 15 beet sugar, right?

10:12:50 16 A. That's usually the case, yes.

10:12:51 17 Q. And paying a small premium means paying a little bit
10:12:56 18 higher price, correct?

10:12:58 19 A. Yes.

10:13:00 20 Q. You also mentioned LSR's expansion while Mr. Yates
10:13:02 21 was questioning you, right?

10:13:07 22 A. Correct.

10:13:09 23 Q. Do you have any personal knowledge as to the status
10:13:11 24 of the LSR expansion?

10:13:13 25 A. No, I don't.

Sproull - cross

10:13:15 1 Q. Mr. Sproull, I would like you to turn then in the
10:13:19 2 binder, the white binder that I gave you when you came in?

10:13:23 3 A. Okay.

10:13:23 4 Q. And please turn to PTX 29 in that binder.

10:13:28 5 A. Okay.

10:13:29 6 Q. The document that you're looking at PTX 29 is an
10:13:33 7 e-mail that up sent to Alan Henderson, correct?

10:13:36 8 A. Yes.

10:13:36 9 Q. Mr. Henderson is the head of industrial sales for
10:13:41 10 ASR?

10:13:41 11 A. That's correct.

10:13:41 12 Q. And he reports to you, correct?

10:13:43 13 A. He does.

10:13:45 14 MR. WOLIN: Your Honor, plaintiff offers PTX 29.

10:13:49 15 MR. YATES: No objection.

10:13:50 16 THE COURT: It's admitted.

10:13:50 17 (PTX Exhibit No. 29 was admitted into evidence.)

10:13:50 18 BY MR. WOLIN:

10:13:53 19 Q. Mr. Sproull, the version of the document you're
10:13:55 20 seeing on the screen has redactions that ASR's attorneys
10:14:00 21 have requested, so you have the full version without
10:14:02 22 redactions in your binder. I'm going to ask you not to
10:14:05 23 reveal anything under the redactions that are shown. Okay.

10:14:08 24 A. Okay. Sounds good.

10:14:09 25 Q. If we look at the second e-mail in the chain, that's

Sproull - cross

10:14:12 1 an e-mail from Mr. Henderson, correct?

10:14:15 2 A. It is.

10:14:15 3 Q. And the subject line of the e-mail which is redacted
10:14:18 4 on the public screen but shown to you, refers to a specific
10:14:22 5 potential customer; correct?

10:14:24 6 A. It does.

10:14:25 7 Q. Mr. Henderson writes to you in the second paragraph
10:14:28 8 of the e-mail, that that customer is requesting a quote for
10:14:35 9 the October through December period only, do you see that?

10:14:39 10 A. I see it, yes.

10:14:41 11 Q. And then below that, Mr. Henderson says below and
10:14:45 12 attached is the competitive analysis for this quote. Is
10:14:48 13 that right?

10:14:48 14 A. I see that, yes.

10:14:49 15 Q. And then below that in the bottom of the first page
10:14:52 16 of the document, Mr. Henderson includes a chart that lists a
10:14:57 17 North Carolina location and a Texas location; right?

10:15:00 18 A. Yes.

10:15:01 19 Q. And these are locations that ASR would be shipping
10:15:05 20 to, correct?

10:15:06 21 A. Yes.

10:15:07 22 Q. So let's look at the section of the chart for the
10:15:12 23 North Carolina location. I'm going to ask you what's in the
10:15:14 24 chart but please don't reveal the specific numbers. Okay?

10:15:17 25 A. Will do.

Sproull - cross

10:15:18 1 Q. The chart provides the amount of sugar expressed as a
10:15:22 2 hundred weight; correct?

10:15:23 3 A. Yes, it does.

10:15:24 4 Q. And the chart provides ASR's proposed pricing?

10:15:28 5 A. Yes, it does.

10:15:29 6 Q. And the chart includes a line with an FOB price,
10:15:32 7 correct?

10:15:32 8 A. Yes.

10:15:33 9 Q. And the chart also includes a line with a delivered
10:15:35 10 price, correct?

10:15:36 11 A. That's correct.

10:15:38 12 Q. And Mr. Henderson's e-mail and this chart compares
10:15:41 13 ASR's price to prices attributed to United and to Imperial,
10:15:43 14 correct?

10:15:44 15 A. Yes.

10:15:46 16 Q. And United and Imperial are the only competitors
10:15:50 17 listed in this competitive analysis for the North Carolina
10:15:53 18 location, is that correct?

10:15:54 19 A. That's correct.

10:15:57 20 Q. So for this North Carolina business that we're seeing
10:16:00 21 up on the screen, ASR assessed that it was competing head to
10:16:02 22 head with United and with Imperial, correct?

10:16:03 23 A. From New Orleans, yes, that's correct.

10:16:10 24 Q. But if we look at the Texas section of the chart, the
10:16:12 25 analysis list different companies; correct?

Sproull - cross

10:16:18 1 A. Yes, it does.

10:16:19 2 Q. Not United and Imperial, correct?

10:16:22 3 A. That's correct.

10:16:23 4 Q. Turning back to the section of the chart on the North

10:16:28 5 Carolina location, ASR assessed that United's delivered

10:16:33 6 price is the same as ASR's price; correct?

10:16:36 7 A. Yes.

10:16:38 8 Q. And ASR's assessed that Imperial's delivered price is

10:16:41 9 lower than both United's and ASR's correct?

10:16:44 10 A. That's the estimate here, yeah.

10:16:47 11 Q. Let's go to the top level e-mail in this document.

10:16:51 12 You wrote back to Mr. Henderson in this e-mail, correct?

10:16:57 13 A. I did.

10:16:57 14 Q. And you said to him, "I think it's really important

10:17:01 15 we signal to the market that there's still going to be

10:17:05 16 tightness."

10:17:08 17 Is that right?

10:17:08 18 A. That's right.

10:17:08 19 Q. And then you wrote, "We need to signal to the market

10:17:13 20 that we're going to maintain price, especially for the

10:17:16 21 October-December quarter."

10:17:19 22 Is that what you wrote?

10:17:20 23 A. That's correct.

10:17:22 24 Q. You can put that document to the side.

10:17:25 25 I would like to have you turn next to PTX 28 in

Sproull - cross

10:17:30 1 your binder, please. And PTX 28 is an e-mail and attachment
10:17:41 2 that you sent to Luis Fernandez, is that right?

10:17:45 3 A. Yes.

10:17:46 4 MR. WOLIN: Your Honor, plaintiff offers PTX 28.

10:17:49 5 THE COURT: Any objection?

10:17:50 6 MR. YATES: No objection, Your Honor.

10:17:51 7 THE COURT: All right. Thank you. It's
10:17:53 8 admitted.

10:17:54 9 (PTX Exhibit No. 28 was admitted into evidence.)

10:17:55 10 BY MR. WOLIN:

10:17:56 11 Q. Let's show the redacted version on the screen. In
10:18:00 12 the exhibit you're forwarding to Mr. Fernandez an e-mail
10:18:04 13 from Mr. Henderson, correct?

10:18:05 14 A. That's correct.

10:18:06 15 Q. And again, Mr. Fernandez is the co-president of ASR?

10:18:10 16 A. Yes.

10:18:11 17 Q. And he's your boss?

10:18:12 18 A. That's correct.

10:18:12 19 Q. The subject line in the e-mail was colloquium recap,
10:18:17 20 right?

10:18:17 21 A. That's right.

10:18:18 22 Q. And that refers to the sugar users' association
10:18:22 23 colloquium event that happens every year?

10:18:24 24 A. That's right.

10:18:25 25 Q. And let's turn to the text of the e-mail from

Sproull - cross

10:18:30 1 Mr. Henderson. The first sentence that Mr. Henderson writes
10:18:35 2 is "below please find a summary of points from the
10:18:41 3 International Sweetener Colloquium that took place last week
10:18:44 4 in Palm Springs, California."

10:18:48 5 Is that right?

10:18:48 6 A. Yes.

10:18:48 7 Q. Let's turn then to the second page of PTX 28, please.
10:18:53 8 There is a section on this page that's labeled Competitive
10:18:58 9 Numbers FY 2021 and Notes. Is that correct?

10:19:02 10 A. Yes.

10:19:03 11 Q. And in this section, Mr. Henderson list several
10:19:07 12 competitors to ASR; correct?

10:19:11 13 A. That's right.

10:19:12 14 Q. Mr. Henderson list estimates of the pricing for each
10:19:16 15 competitor, correct?

10:19:17 16 A. Yes, he does.

10:19:18 17 Q. And that list includes United?

10:19:20 18 A. Yes.

10:19:21 19 Q. And the list includes both -- refers to United RRV,
10:19:24 20 or Red River Valley, and Clewiston, Florida, correct?

10:19:30 21 A. Yes.

10:19:31 22 Q. And the pricing listed for Red River Valley for
10:19:35 23 United is different than the pricing for Clewiston, correct?

10:19:36 24 A. Yes, it is.

10:19:38 25 Q. The list also includes Imperial, correct?

Sproull - cross

10:19:42 1 A. I see that, yes.

10:19:46 2 Q. Can you put that document aside, Mr. Sproull. I
10:19:49 3 would like to ask you about one additional document.

10:19:52 4 If you turn, please, to PTX 30 in your binder.

10:19:58 5 And this document is an e-mail that you sent to

10:20:01 6 Mr. Fernandez on May 26, 2021, correct?

10:20:04 7 A. Yes.

10:20:06 8 MR. WOLIN: Your Honor, plaintiff offers PTX 30.

10:20:09 9 MR. YATES: No objection.

10:20:10 10 THE COURT: Thank you. It's admitted.

10:20:12 11 (PTX Exhibit No. 30 was admitted into evidence.)

10:20:13 12 BY MR. WOLIN:

10:20:14 13 Q. So if you look at the bottom e-mail in the chain,
10:20:18 14 that's an e-mail from Mr. Henderson, correct?

10:20:21 15 A. Yes.

10:20:22 16 Q. And the subject line of the e-mail refers to a
10:20:25 17 specific distributor, correct?

10:20:28 18 A. It does.

10:20:28 19 Q. And in Mr. Henderson's e-mail he writes in talking
10:20:32 20 with Jenkins and Rich Wistisen, they believe, and then
10:20:32 21 provides some information about Cargill pricing; correct?

10:20:42 22 A. Yes.

10:20:42 23 Q. Rich Wistisen is the sugar industry analyst?

10:20:42 24 A. Yes.

10:20:42 25 Q. Let's go to the e-mail directly above that one. In

Sproull - cross

10:20:52 1 that e-mail Mr. Henderson forwards his e-mail below to you,
10:20:56 2 correct?

10:20:56 3 A. That's correct.

10:20:57 4 Q. And at the end of the e-mail Mr. Henderson writes,
10:21:02 5 more below, right?

10:21:03 6 A. Yes.

10:21:04 7 Q. And more below refers to Mr. Henderson's e-mail below
10:21:10 8 that includes information from Mr. Wistisen, correct?

10:21:16 9 A. Yes.

10:21:17 10 Q. And then you forwarded the e-mail from Mr. Wistisen
10:21:21 11 to Mr. Fernandez?

10:21:23 12 A. Correct.

10:21:24 13 Q. And Mr. Fernandez is the co-president of ASR?

10:21:28 14 A. He is.

10:21:28 15 Q. You wrote to Mr. Fernandez, "Below gives us an idea
10:21:32 16 of what we'd have to do to buy share."

10:21:34 17 Is that right?

10:21:34 18 A. That's right.

10:21:34 19 Q. And then you suggest to Mr. Fernandez what price ASR
10:21:40 20 would have to offer to win this business, correct?

10:21:40 21 A. That's correct.

10:21:45 22 Q. And if we put that aside, Mr. Sproull. I want to ask
10:21:50 23 you just a few more questions.

10:21:52 24 ASR has a code of conduct, is that correct?

10:21:52 25 A. Yes, we do.

Sproull - redirect

10:21:56 1 Q. And it has a ethics policy?

10:21:59 2 A. Yes, we do.

10:21:59 3 Q. And it's a written policy, correct?

10:22:01 4 A. Yes.

10:22:02 5 Q. And ASR employees periodically have to review the
10:22:06 6 policy and reaffirm it?

10:22:07 7 A. Yes, sir.

10:22:07 8 Q. And that ethics policy would prevent an ASR employee
10:22:13 9 from directly talking about ASR's pricing with a
10:22:15 10 representative of one of ASR's competitors; is that right?

10:22:19 11 A. I think that's right, yes.

10:22:21 12 MR. WOLIN: No further questions, Your Honor.

10:22:21 13 THE COURT: All right. Thank you.

10:22:23 14 Redirect.

10:22:25 15 MR. YATES: Just a couple of questions, Your
10:22:27 16 Honor.

10:22:27 17 REDIRECT EXAMINATION

10:22:28 18 BY MR. YATES:

10:22:29 19 Q. Mr. Sproull, DTX 030, the last document that the
10:22:32 20 government's counsel was going through with you, sir.

10:22:40 21 A. Yes.

10:22:41 22 Q. You focused on Rich Wistisen in this document. Do
10:22:42 23 you see there is also a reference to Jenkins?

10:22:42 24 A. I do.

10:22:42 25 Q. And is that Frank Jenkins of Jenkins Sugar Group?

Sproull - redirect

10:22:52 1 A. That would be my understanding.

10:22:53 2 Q. Is it your understanding that Jenkins Sugar Group
10:22:56 3 works with large industrial customers like Kraft and General
10:23:00 4 Mills and provides consulting services to them?

10:23:02 5 A. Absolutely.

10:23:04 6 Q. Let's go back to PTX 029, sir.

10:23:13 7 A. Okay.

10:23:14 8 Q. And first of all, the quote that's being discussed
10:23:18 9 here, this is a quote for a short-term period; correct,
10:23:21 10 three months?

10:23:23 11 A. Yes.

10:23:24 12 MR. WOLIN: Your Honor, I was going to say that
10:23:27 13 the confidential information is being displayed on the
10:23:31 14 screen, but it looks like they took it down.

10:23:34 15 MR. YATES: Thank you.

10:23:35 16 BY MR. YATES:

10:23:37 17 Q. ASR typically enters into contracts with industrial
10:23:40 18 customers that are for more than a year, correct?

10:23:43 19 A. It really is customer by customer, some need supply
10:23:47 20 for one quarter, some need for a year, some want to book for
10:23:52 21 further out than that.

10:23:54 22 Q. Fair enough.

10:23:55 23 In 2020, sir, there was a force majeure declared
10:24:00 24 by some beet suppliers, correct?

10:24:02 25 A. Absolutely.

Sproull - redirect

10:24:03 1 Q. At around this time?

10:24:04 2 A. In November of '19, so about two months before this
10:24:07 3 time.

10:24:08 4 Q. When you were referring to sending a signal to the
10:24:11 5 market, who are you referring to?

10:24:13 6 A. I only signal to customers, so my customers ask me
10:24:16 7 for indications, they don't often -- this is not a quote,
10:24:20 8 this is tell me what your price would be if I wanted help in
10:24:24 9 this period in this time. For me I'm telling Alan who works
10:24:28 10 for me, I don't want customers to think that the situation
10:24:31 11 was changed because the market was going to remain very
10:24:34 12 tight going in the October-December quarter.

10:24:36 13 Q. Milling and Baking is referred to, what is that, sir?

10:24:40 14 A. It's a magazine. You can call it a piece of trade
10:24:44 15 collateral that's published digitally and.

10:24:48 16 Q. Do you understand that the USDA includes information
10:24:51 17 from Milling and Baking in its publication that it puts out?

10:24:55 18 A. Yes, they do.

10:24:59 19 MR. YATES: Thank you. No further questions.

10:24:52 20 THE COURT: Thank you very much. Thank you, sir
10:25:00 21 for coming up here. And you are excused.

10:25:03 22 What's next?

10:25:06 23 MR. WOLIN: Your Honor, we call Eric Speece. My
10:25:10 24 colleague, Ryan Sandrock, will be handling it.

10:26:03 25 COURT CLERK: Please raise your right hand.

Speece - direct

10:26:06 1 Please state and spell your full name for the record.

10:26:10 2 THE WITNESS: Eric Speece, E-R-I-C, S-P-E-E-C-E.

10:26:17 3 ERIC SPEECE, having been duly sworn, was
10:26:21 4 examined and testified as follows:

10:26:25 5 DIRECT EXAMINATION

10:26:29 6 BY MR. THORNBURGH:

10:26:30 7 Q. Good morning, Mr. Speece.

10:26:31 8 A. Good morning.

10:26:31 9 Q. Mr. Speece, you are the director of strategic
10:26:34 10 accounts at United, correct?

10:26:34 11 A. Correct.

10:26:34 12 Q. And you have worked in the sugar industry since 2008,
10:26:40 13 correct?

10:26:40 14 A. Correct.

10:26:41 15 Q. And you joined United in 2017, correct?

10:26:44 16 A. Correct.

10:26:45 17 Q. And you held your current position as director of
10:26:48 18 strategic accounts since 2020, right?

10:26:51 19 A. Correct.

10:26:51 20 Q. And in your current position, you report to Dirk
10:26:52 21 Swart, right?

10:26:52 22 A. Yes.

10:26:52 23 Q. And Mr. Speece, strategic account at United refers to
10:27:00 24 a large customer that buys consistent refined sugar volume
10:27:04 25 year over year and tends to have a national footprint, is

Speece - direct

10:27:09 1 **that right?**

10:27:09 2 A. **That's correct.**

10:27:10 3 Q. **And as director of strategic accounts you have**
10:27:13 4 **responsibility for United relationships with several**
10:27:16 5 **strategic account customers correct?**

10:27:19 6 A. **That's correct.**

10:27:19 7 Q. **You have responsible for Hershey, correct, sir?**

10:27:21 8 A. **Correct.**

10:27:22 9 Q. **And Kellogg's?**

10:27:23 10 A. **Correct.**

10:27:24 11 Q. **And Ocean Spray?**

10:27:25 12 A. **Correct.**

10:27:26 13 Q. **And Campbell soup?**

10:27:28 14 A. **Correct.**

10:27:29 15 Q. **And Mondola?**

10:27:30 16 A. **Correct.**

10:27:31 17 Q. **And Danone?**

10:27:31 18 A. **Correct.**

10:27:32 19 Q. **Danone makes Dannon Yogurt, right, sir?**

10:27:32 20 A. **Yes.**

10:27:32 21 Q. **And Unilever?**

10:27:32 22 A. **Yes.**

10:27:32 23 Q. **And Mars?**

10:27:32 24 A. **Correct.**

10:27:32 25 Q. **And Pepsi, correct?**

Speece - direct

10:27:41 1 A. Correct.

10:27:43 2 Q. Mr. Speece, the price that customers pay United for
10:27:46 3 refined sugar is known as the delivered price; is that
10:27:49 4 right?

10:27:49 5 A. That's correct.

10:27:49 6 Q. And the starting point for determining the delivered
10:27:52 7 price is the free on board, or FOB price, sir?

10:27:57 8 A. That is.

10:27:58 9 Q. And another component of the delivered price that
10:28:01 10 customers pay is freight, right?

10:28:03 11 A. Correct.

10:28:04 12 Q. And freight costs typically account for between five
10:28:07 13 and twelve percent of the delivered price that United's
10:28:11 14 customers pay, is that right?

10:28:12 15 A. Right.

10:28:13 16 Q. And in your experience, Mr. Speece, freight costs
10:28:16 17 have impacted United's ability to be competitive to serve
10:28:21 18 customers in some locations, is that right?

10:28:23 19 A. That's correct.

10:28:24 20 Q. And, for example, freight costs restrict United's
10:28:27 21 ability to be competitive in places like California and
10:28:31 22 Arizona, correct, sir?

10:28:32 23 A. It can, yes.

10:28:34 24 Q. And Mr. Speece, you have conversations with your
10:28:37 25 boss, Mr. Swart, about pricing for your customers, correct,

Speece - direct

10:28:40 1 **sir?**

10:28:40 2 A. **Correct.**

10:28:41 3 Q. **Okay. And many of your customers, Mr. Speece,**
10:28:44 4 **utilize what is called an RFQ or RFP process for purchasing**
10:28:48 5 **the refined sugar, correct?**

10:28:51 6 A. **Correct.**

10:28:51 7 Q. **And RFP and RFG process is when a customer ask United**
10:28:58 8 **to provide pricing for their refine sugar business covering**
10:29:00 9 **one or more of that customers locations, correct, sir?**

10:29:04 10 A. **Correct.**

10:29:04 11 Q. **And sometimes customers will purchase from United**
10:29:06 12 **outside this RFP process and will do so instead of what is**
10:29:11 13 **called a spot basis, is that right, sir?**

10:29:14 14 A. **That happens, yes.**

10:29:15 15 Q. **And a spot purchase usually refers to a purchase of**
10:29:18 16 **sugar for the immediate future or the next quarter; correct,**
10:29:21 17 **sir?**

10:29:21 18 A. **That's how I would define it.**

10:29:24 19 Q. **Mr. Speece, some United customers will only accept**
10:29:27 20 **cane sugar at one or more of their facilities, is that**
10:29:31 21 **right?**

10:29:31 22 A. **Yes. Some, yes.**

10:29:32 23 Q. **And Domino, for example, has a cane only requirement**
10:29:36 24 **at their facility in Jacksonville, Florida, right?**

10:29:40 25 A. **That's correct.**

Speece - direct

10:29:40 1 Q. Mr. Speece, M&A International is also one of your
10:29:45 2 customers; correct.

10:29:45 3 A. Yes.

10:29:46 4 Q. And M&A International is a distributor, correct?

10:29:50 5 A. Correct.

10:29:51 6 Q. And distributors in your experience at United tend to
10:29:54 7 serve smaller end customers than United, correct?

10:29:57 8 A. They handle bulk trucks and down to small bags.

10:30:01 9 Q. But Mr. Speece, in your experience distributors tend
10:30:04 10 to serve smaller end customers than United, correct, sir?

10:30:08 11 A. They tend to smaller customers.

10:30:11 12 Q. And Mr. Speece, you do not recall an instance in
10:30:14 13 which United provided a bid to a customer in response to an
10:30:18 14 RFP or RFQ but United ended up losing all of that customer's
10:30:21 15 business to a distributor instead, isn't that right?

10:30:27 16 A. Can you repeat that?

10:30:28 17 Q. Sure.

10:30:29 18 You do not recall an instance in which United
10:30:32 19 bid for a customer's business through an RFP or RFQ but
10:30:35 20 actually ended up losing all that business to a distributor,
10:30:38 21 is that correct?

10:30:42 22 A. All of the business, no.

10:30:43 23 Q. Thank you.

10:30:44 24 Mr. Speece, next please turn to tab PTX in the
10:30:45 25 binder in front of you, PTX 395. That wasn't very helpful.

Speece - direct

10:30:52 1 Plaintiffs Exhibit 395 appears there. And Mr. Speece, you
10:31:00 2 recognize the calendar invite --

10:31:02 3 A. I'm sorry, 395?

10:31:04 4 Q. 395, yes, sir.

10:31:14 5 A. I'm there.

10:31:21 6 Q. Mr. Speece, you do recognize this calendar invite and
10:31:24 7 e-mail stream, correct, sir?

10:31:26 8 A. I do.

10:31:33 9 MR. THORNBURGH: Your Honor, there is no
10:31:34 10 outstanding objections. Plaintiffs move to admit
10:31:37 11 Exhibit 395.

10:31:39 12 Q. Mr. Speece, this is an e-mail conversation between
10:31:41 13 you and Gwendolyn Kernan, correct, sir?

10:31:45 14 A. Yes.

10:31:45 15 Q. And Ms. Kernan works for Danone, correct?

10:31:49 16 A. Correct.

10:31:49 17 Q. In this e-mail stream you are discussing terms for
10:31:52 18 providing liquid sugar to Danone facility in Jacksonville,
10:31:57 19 Florida, correct, sir?

10:31:59 20 A. Delivered prices, correct.

10:32:00 21 Q. And so looking at this e-mail at the bottom of
10:32:04 22 page 1, you reply to Ms. Kernan on Wednesday, May 15th,
10:32:08 23 2019, and you wrote in part, "Thanks for your feedback and
10:32:12 24 discussion on our quote for 2020. I also like to lead with
10:32:15 25 my best price taking into consideration the market and our

Speece - direct

10:32:22 1 competition."

10:32:24 2 That's what you wrote, correct, sir?

10:32:29 3 A. That's what I wrote, yes.

10:32:30 4 Q. And Mr. Speece, that's what you consistently try to
10:32:34 5 do in your job, you lead with your best price, taking into
10:32:38 6 consideration the competition, correct sir?

10:32:40 7 A. I take into consideration the competition.

10:32:42 8 Q. And then in the next paragraph you wrote, "We do have
10:32:45 9 a significant freight disadvantage over one competitor in
10:32:50 10 Savannah, Georgia, which is why I went with a much lower FOB
10:32:51 11 bulk basis number."

10:32:57 12 And Mr. Speece, the competition that you were
10:32:59 13 you referring to in that sentence was Imperial Sugar,
10:33:02 14 correct?

10:33:02 15 A. Correct.

10:33:03 16 Q. So Mr. Speece, you were indicating here that you led
10:33:06 17 with a lower price for this business because you knew
10:33:12 18 starting that Imperial had a freight advantage over United
10:33:16 19 for this customer location, correct, sir?

10:33:18 20 A. I knew they had a freight advantage, yeah.

10:33:22 21 Q. And then in the next sentence you wrote, "Given your
10:33:24 22 recent feedback, we have lowered our FOB bulk basis down to
10:33:30 23 \$35 per hundred weight."

10:33:32 24 So Mr. Speece, you then lowered United's offer
10:33:36 25 even more in response to the feedback that you received from

Speece - direct

10:33:39 1 Ms. Kernan, correct, sir?

10:33:41 2 A. They had indicated that they were high, yes.

10:33:45 3 Q. And Mr. Speece, the only competitor that you mention
10:33:47 4 in this e-mail is Imperial Sugar; correct, sir?

10:33:50 5 A. The only one I mention, yes.

10:33:52 6 Q. You can put that document aside. And ask that you
10:33:55 7 now please turn to tab PTX 370. And Mr. Speece, an
10:34:05 8 unredacted version of plaintiff's Exhibit 370 appears there.
10:34:09 9 In a moment a redacted version will be shown on the screen.

10:34:17 10 So Mr. Speece, you recognize this e-mail from
10:34:21 11 May 2021, correct?

10:34:21 12 A. I do.

10:34:21 13 MR. THORNBURGH: Your Honor, plaintiff moves to
10:34:24 14 admit plaintiff's Exhibit 370.

10:34:28 15 MS. GIORDANO: No objection, Your Honor.

10:34:29 16 THE COURT: All right. It's admitted.

10:34:29 17 (PTX Exhibit No. 370 was admitted into
10:34:32 18 evidence.)

10:34:32 19 BY MR. THORNBURGH:

10:34:32 20 Q. So Mr. Speece, in this e-mail, you are giving your
10:34:32 21 boss, Mr. Swart, an update on contract negotiations that you
10:34:32 22 were having with Kellogg's and Campbell Soup, right, sir?

10:34:42 23 A. Correct.

10:34:42 24 Q. And I want to focus first on the second paragraph.
10:34:42 25 For Campbell Soup you were bidding on new business in

Speece - direct

10:34:52 1 Charlotte, North Carolina, correct?

10:34:54 2 A. Correct.

10:34:54 3 Q. And you understood this to be Imperial's business at
10:34:58 4 the time, correct, sir?

10:34:58 5 A. Correct.

10:34:59 6 Q. And then you estimated in this e-mail what you
10:35:03 7 thought Imperial's FOB price would be for a delivered price
10:35:07 8 of \$42; correct, sir?

10:35:09 9 A. Given a reference to Dirk Swart, yes.

10:35:12 10 Q. Mr. Speece, why don't you provide pricing estimates
10:35:15 11 for any or competitors in this e-mail, sir?

10:35:18 12 A. I was just simply giving Dirk a reference of what a
10:35:21 13 42 delivered price would back into Savannah, Georgia.

10:35:25 14 Q. If you go up to the first paragraph, sir, you are
10:35:28 15 giving Mr. Swart an update on your negotiation with
10:35:32 16 Kellogg's, right?

10:35:33 17 A. Right.

10:35:34 18 Q. In the second sentence you wrote, "It looks like we
10:35:37 19 may get all of Memphis because of issues with supply and
10:35:40 20 color with Sucro Can."

10:35:42 21 Mr. Speece, what were you referring to here when
10:35:42 22 you wrote of Kellogg's issue with supply and with Sucro Can?

10:35:52 23 A. Kellogg's had indicated to me that they were having
10:35:54 24 some issues with their current supplier which at that time
10:35:56 25 was Sucro Can.

Speece - direct

10:35:58 1 Q. Mr. Speece, you can set plaintiff's Exhibit 370
10:36:03 2 aside. I ask you that you turn to PTX 414 in your binder,
10:36:08 3 sir. And Mr. Speece, you recognize this e-mail stream,
10:36:15 4 correct?

10:36:15 5 A. I do.

10:36:16 6 MR. THORNBURGH: Your Honor, the plaintiff moves
10:36:18 7 to admit plaintiff's Exhibit 414.

10:36:21 8 MS. GIORDANO: No objection, Your Honor.

10:36:22 9 THE COURT: Thank you. It's admitted.

10:36:24 10 (PTX Exhibit No. 414 was admitted into
10:36:26 11 evidence.)

10:36:26 12 BY MR. THORNBURGH:

10:36:28 13 Q. So, Mr. Speece, this is an e-mail stream involving
10:36:29 14 you and Steve Kline from Pepsi, is that correct, sir?

10:36:31 15 A. And several others, but yes, it's correct.

10:36:31 16 Q. And so Steve Kline from Pepsi reached out to you and
10:36:32 17 others at United to ask if United could provide refined
10:36:33 18 sugar to the Pepsi facility in Wytheville, Virginia,
10:36:34 19 correct, sir?

10:36:35 20 A. Correct.

10:36:36 21 Q. At the time this e-mail that is on the screen was
10:36:37 22 sent, April 21st, 2021, United was not supplying refined
10:36:38 23 sugar to this particular Pepsi facility, correct, sir?

10:36:39 24 A. Correct.

10:37:00 25 Q. And this request as you understood it at the time was

Speece - direct

10:37:04 1 a one off request from Pepsi, right, sir?

10:37:07 2 A. Yeah, they were having some issues with another
10:37:09 3 supplier and they're asking for help.

10:37:11 4 Q. So this would be what is commonly known as a spot
10:37:14 5 purchase then, correct, sir?

10:37:15 6 A. In this case, no.

10:37:16 7 Q. It's not a spot purchase?

10:37:18 8 A. No.

10:37:18 9 Q. It's a purchase for sugar in the immediate future,
10:37:20 10 correct, sir?

10:37:21 11 A. No.

10:37:21 12 Q. How far in the future was this purchase for, sir?

10:37:24 13 A. It's not a purchase, we would just add it to their
10:37:29 14 current contract, we would add a new line imported, it's a
10:37:32 15 new purchase.

10:37:33 16 Q. But it was a facility that you were not otherwise
10:37:35 17 serving at the time, correct, sir?

10:37:37 18 A. That's right.

10:37:37 19 Q. I want to direct your attention to page 2 of the
10:37:40 20 e-mail which Mr. Cline wrote, "Can United cover any of these
10:37:42 21 out of Tyner, we also asked Imperial, so first in wins. We
10:37:50 22 will take what we can get due to Domino fire."

10:37:52 23 Did I read that correctly, sir?

10:37:54 24 A. You did.

10:37:55 25 Q. You understood United -- you understood Imperial to

Speece - direct

10:37:58 1 be United's only competition for this business, right, sir?

10:38:01 2 A. No, that's not what I understood.

10:38:04 3 Q. He said first in wins between you and Imperial,
10:38:08 4 right, sir?

10:38:08 5 A. Yes.

10:38:09 6 Q. Put that document aside.

10:38:11 7 Mr. Speece, you regularly receive industry
10:38:16 8 reports with information on the sugar industry, right?

10:38:19 9 A. I do receive reports, yes.

10:38:21 10 Q. And one industry report that you receive is from a
10:38:23 11 company called Commodity Info, is that right, sir?

10:38:26 12 A. That's correct.

10:38:27 13 Q. And the lead analyst and president of Commodity Info
10:38:32 14 is a man named Rich Wistisen, is that correct?

10:38:35 15 A. That's correct.

10:38:36 16 Q. And you have known Mr. Wistisen since you worked at
10:38:39 17 Cargill prior to your job at United, correct?

10:38:42 18 A. That's correct.

10:38:42 19 Q. And you regularly communicate with Mr. Wistisen every
10:38:46 20 month or two, correct, sir?

10:38:47 21 A. Every month or two, correct.

10:38:49 22 Q. Do you recall when the last time was you spoke to
10:38:54 23 Mr. Wistisen?

10:38:55 24 A. It was sometime in early March.

10:38:58 25 Q. Mr. Speece, next please turn to tab PTX 393 in your

Speece - direct

10:39:03 1 binder, please. And Mr. Speece, you recognize the e-mail
10:39:13 2 stream there?

10:39:15 3 A. I see it's from me and Rich Wistisen, yes.

10:39:19 4 MR. THORNBURGH: Your Honor, plaintiff moves to
10:39:21 5 admit plaintiff's Exhibit 393.

10:39:23 6 MS. GIORDANO: No objection.

10:39:24 7 THE COURT: Thank you. It's admitted.

10:39:24 8 (PTX Exhibit No. 393 was admitted into
10:39:26 9 evidence.)

10:39:26 10 BY MR. THORNBURGH:

10:39:26 11 Q. Mr. Speece, this is a fairly long e-mail exchange, so
10:39:26 12 I'm going to ask that you go to page 4 to start. That's the
10:39:31 13 page on the screen in front of you. There is an e-mail
10:39:37 14 there from Mr. Wistisen to you on September 21, 2020, at
10:39:41 15 1:52 p.m. Do you see that, sir?

10:39:41 16 A. I do.

10:39:41 17 Q. And I want to go to the bottom of that e-mail. And
10:39:41 18 Mr. Wistisen asked you if there is, "anything new on the
10:39:51 19 pricing front." Do you see -- excuse me, he asked you if
10:39:52 20 there is, "anything new of interest on the pricing front."

10:40:00 21 Do you see that?

10:40:00 22 A. I do.

10:40:02 23 Q. Okay. And then Mr. Wistisen writes, "hearing beets
10:40:07 24 well sold, except possibly NSM 80 to 85 percent and prices
10:40:12 25 firm to higher. Michigan \$38.50 plus selective selling, 90

Speece - direct

10:40:22 1 plus percent, Western \$36.75, mostly out of the market, 90
10:40:27 2 plus percent."

10:40:28 3 Do you see that?

10:40:29 4 A. I do.

10:40:29 5 Q. So I want to break down that sentence, Mr. Speece.

10:40:33 6 First, Mr. Wistisen here is providing you information about
10:40:38 7 the current prices of United's competitors, correct, sir?

10:40:42 8 A. Providing spot prices for some of our competitors,
10:40:46 9 yes.

10:40:46 10 Q. And second, Mr. Wistisen is providing information
10:40:49 11 about how much of each of these competitors have sold of
10:40:52 12 their annual crop for the current year, is that right?

10:40:54 13 A. That's correct.

10:40:54 14 Q. That's what the percentage figures in this e-mail
10:40:57 15 refer to, right, sir?

10:41:00 16 A. Yes.

10:41:00 17 Q. And Mr. Speece, information about how much crop a
10:41:03 18 sugar processor has sold in the current fiscal year is
10:41:06 19 information that your customers tend to care about, isn't
10:41:10 20 that right, sir?

10:41:11 21 A. Our customers do tend to track it, yes.

10:41:12 22 Q. And part of the reason United's customers care about
10:41:15 23 that information is because it can impact prices, right,
10:41:18 24 sir?

10:41:20 25 A. I wouldn't say that.

Speece - direct

10:41:25 1 Q. You wouldn't say that, sir?

10:41:27 2 A. No.

10:41:29 3 Q. I would like to ask you, Mr. Speece, to turn to the
10:41:32 4 tab with your litigation deposition transcript and turn to
10:41:36 5 page 249, please.

10:41:48 6 A. You said 249?

10:41:50 7 Q. Yes, sir. And I would like to direct your attention
10:41:52 8 to line 22. It should be the last tab in your notebook,
10:42:13 9 sir.

10:42:27 10 A. I don't think I have -- 249?

10:42:30 11 Q. Sorry, page 249, sir, in a table marked Deposition
10:42:34 12 Transcript, it's the last tab in your notebook. It's
10:42:39 13 page 249 of that document.

10:42:41 14 A. Oh, that one.

10:42:51 15 Q. Are you there, sir?

10:42:59 16 A. I'm there, yep.

10:43:01 17 Q. And so at your deposition, I asked you, Mr. Speece,
10:43:04 18 "In your experience at United, the higher the percentage
10:43:07 19 booked that United has of its refined sugar, did that lead
10:43:11 20 often to increased prices?"

10:43:13 21 And your answer was, "No, I don't -- I don't
10:43:16 22 think it leads to -- it's just, if your higher percentage
10:43:20 23 showed you may have a lesser discount to your ask price."

10:43:25 24 MS. GIORDANO: Your Honor, I don't believe this
10:43:27 25 is at all inconsistent with the question he asked

Speece - direct

10:43:29 1 Mr. Speece.

10:43:31 2 MR. THORNBURGH: I asked Mr. Speece if the
10:43:32 3 percentage sold of the book could affect pricing.

10:43:36 4 MS. GIORDANO: That's what customers care about.

10:43:37 5 THE COURT: You don't need to fight about it. I
10:43:40 6 am reading the question asked and I have the transcript in
10:43:42 7 front of me. I can determine whether it's proper
10:43:45 8 impeachment. Got it. Go ahead.

10:43:47 9 THE WITNESS: Can you restate the question?

10:43:50 10 Q. Mr. Speece, part of the reason customers care about
10:43:51 11 how much of a crop a sugar processor has sold is because it
10:43:52 12 impacts sugar prices, right?

10:43:53 13 A. It can.

10:44:00 14 Q. Okay. Thank you.

10:44:02 15 Mr. Speece, this information in this e-mail
10:44:07 16 about your competitor's pricing and the percentage of their
10:44:10 17 book sold, this is information that you would not have
10:44:13 18 otherwise known at this time; correct, sir?

10:44:15 19 A. No, there are other information. We can get this
10:44:18 20 information from other venues.

10:44:21 21 Q. Mr. Speece, do you recall getting this information,
10:44:24 22 this specific information from someone else at this time
10:44:27 23 other than Mr. Wistisen, sir?

10:44:29 24 A. This specific, no, percentage sold, yes.

10:44:32 25 Q. You don't -- you recall getting the specific

Speece - direct

10:44:36 1 information from someone else at this time, sir?

10:44:38 2 A. I just said I do not recall getting this specific
10:44:41 3 information, but you can get this information from other
10:44:44 4 reports.

10:44:44 5 Q. In the next sentence of the e-mail Mr. Wistisen
10:44:47 6 writes, "I hear you folks are also 90 plus percent and I
10:44:51 7 guess still mostly firm at \$36.50 and \$38, correct?"

10:44:58 8 That's what you wrote, right, sir?

10:45:00 9 A. That's what he wrote.

10:45:01 10 Q. In this sentence you understood Mr. Wistisen to be
10:45:05 11 asking how much of United's crop was booked or sold for the
10:45:09 12 current fiscal year, right?

10:45:11 13 A. I was trying to confirm, yes.

10:45:14 14 Q. And the \$36.50 in his sentence here, that refers to
10:45:17 15 United's price for beet sugar at the time, correct?

10:45:20 16 A. That's correct.

10:45:21 17 Q. And the \$38, that refers to United's cane price at
10:45:24 18 the time, correct, sir?

10:45:26 19 A. Correct.

10:45:27 20 Q. Now, I want to go down a few lines in this e-mail,
10:45:30 21 Mr. Wistisen wrote, "Hearing ASR despite Chalmette situation
10:45:32 22 showing a little more willingness to discount on both
10:45:34 23 coasts. They have been lagging on coverage."

10:45:41 24 Did I read that correctly, sir?

10:45:42 25 A. You did.

Speece - direct

10:45:43 1 Q. And ASR here is referring to Domino, a competitor to
10:45:46 2 United, correct?

10:45:47 3 A. Correct.

10:45:48 4 Q. And then Mr. Wistisen in the next few lines passing
10:45:54 5 along information about how much business Cargill has booked
10:45:57 6 for the 2021 fiscal year, correct, sir?

10:46:00 7 A. Correct.

10:46:00 8 Q. And Cargill is also a competitor to United, right?

10:46:04 9 A. Correct.

10:46:06 10 Q. Mr. Speece, you wouldn't call Cargill and ask them
10:46:10 11 how much of their book is currently booked for the current
10:46:13 12 fiscal year, correct, sir?

10:46:15 13 A. I would not.

10:46:16 14 Q. Why not?

10:46:17 15 A. I just wouldn't do it.

10:46:19 16 Q. Is there any company policy that prevents you from
10:46:21 17 doing so, sir?

10:46:23 18 A. No, it's only my policy, I don't call up competitors
10:46:28 19 and talk about percent booked or prices.

10:46:30 20 Q. Mr. Speece, I'm now going to direct your attention
10:46:32 21 back up to the top of page 4 of the e-mail stream. This is
10:46:37 22 an e-mail from you to Mr. Wistisen, correct, sir?

10:46:40 23 A. That's correct.

10:46:41 24 Q. And you wrote, "We are firm at 36.50, no change and
10:46:45 25 now 38.50 on cane. An increase of \$0.50 per hundred weight.

Speece - direct

10:46:50 1 And yes, you heard correctly, we are 90 percent sold."

10:46:54 2 That's what you wrote, right, sir?

10:46:55 3 A. Yes.

10:46:56 4 Q. The 36.50 here, that refers to United's then current
10:47:00 5 prices for beet, right, sir?

10:47:02 6 A. Correct.

10:47:02 7 Q. And the 38.50, that refers to United's then current
10:47:06 8 prices for cane sugar, right?

10:47:09 9 A. Yes.

10:47:10 10 Q. And Mr. Speece, United does not publish these prices
10:47:14 11 on its public website, correct, sir?

10:47:17 12 A. We do not.

10:47:18 13 Q. Okay. And the 90 plus percent in this e-mail, that
10:47:21 14 refers to how much of United's crop it has sold for the 2021
10:47:28 15 fiscal year, correct, sir?

10:47:29 16 A. Correct.

10:47:29 17 Q. So Mr. Wistisen had heard from someone else that
10:47:34 18 United was 90 percent sold and you went ahead and confirmed
10:47:38 19 for him that that information was correct, right?

10:47:40 20 A. I did, yes.

10:47:42 21 Q. Mr. Speece, does United publish the percentage of its
10:47:45 22 crop that is booked for the current fiscal year?

10:47:48 23 A. Do we publish, no.

10:47:50 24 Q. Is that information that is available on United's
10:47:52 25 customer portal, sir?

Speece - direct

10:47:54 1

A. No.

10:47:55 2

Q. I would like to go to the bottom of page 3, now,

10:48:00 3

please. So Mr. Wistison here responds to your e-mail on

10:48:06 4

September 22nd at 2:29 p.m., do you see that?

10:48:08 5

A. I do.

10:48:09 6

Q. And he wrote, "Was soft for a minute on the coasts,

10:48:13 7

but ASR saying back up to \$40.50 to \$41."

10:48:20 8

Do you see that?

10:48:21 9

A. I do.

10:48:23 10

Q. Mr. Speece, you understood that to mean that

10:48:25 11

Mr. Wistisen had received updated pricing information from

10:48:30 12

ASR, correct, sir?

10:48:31 13

A. I don't know exactly who he was getting it from.

10:48:35 14

Q. So you weren't sure what he meant by ASR saying, sir?

10:48:39 15

A. I assume it's from ASR, but I don't know exactly who.

10:48:44 16

Q. And you would never call ASR directly to get this

10:48:48 17

information, correct, sir?

10:48:49 18

A. Correct.

10:48:50 19

Q. And then if you look a few lines down in this e-mail,

10:48:53 20

Mr. Wistisen writes, "Waiting for confirm from Michigan."

10:48:57 21

Do you see that?

10:48:59 22

A. I do.

10:49:00 23

Q. And what did you understand Mr. Speece to be

10:49:03 24

indicating there, sir?

10:49:05 25

A. It looks like he's waiting to confirm how sold they

Speece - direct

10:49:13 1 are.

10:49:13 2 Q. You can put that document aside, sir. I would next
10:49:16 3 ask you to please turn to tab PTX 389 in your binder.

10:49:30 4 A. Okay.

10:49:30 5 Q. Mr. Speece, you recognize this e-mail stream with
10:49:32 6 Mr. Wistisen from March 2021, correct, sir?

10:49:37 7 A. I see it in front of me.

10:49:39 8 MR. THORNBURGH: Your Honor, plaintiff moves to
10:49:41 9 admit plaintiff's Exhibit 389, please.

10:49:44 10 MS. GIORDANO: No objection.

10:49:45 11 THE COURT: It's admitted.

10:49:46 12 (PTX Exhibit No. 389 was admitted into
10:49:47 13 evidence.)

10:49:47 14 BY MR. THORNBURGH:

10:49:47 15 Q. Mr. Speece, you can set that document aside, we can
10:49:50 16 come back to it if we have time. I next can you to turn to
10:49:53 17 PTX 430. And Mr. Speece, do you recognize this e-mail
10:50:05 18 stream, correct, sir?

10:50:06 19 A. I do.

10:50:07 20 MR. THORNBURGH: Your Honor, plaintiff moves to
10:50:09 21 admit plaintiffs Exhibit 430 into evidence.

10:50:12 22 MS. GIORDANO: No objection.

10:50:13 23 THE COURT: All right. Thank you.

10:50:14 24 (PTX Exhibit No. 430 was admitted into
10:50:15 25 evidence.)

Speece - direct

10:50:15 1 BY MR. THORNBURGH:

10:50:18 2 Q. Mr. Speece, this is another e-mail conversation
10:50:20 3 between you and Mr. Wistisen, correct, sir?

10:50:22 4 A. Correct.

10:50:24 5 Q. I want to start on the page -- excuse me, the bottom
10:50:27 6 of page 1, and there is an e-mail, Mr. Wistisen wrote you on
10:50:31 7 February 15th at 3:26 p.m., do you see that?

10:50:34 8 A. I do.

10:50:36 9 Q. And Mr. Wistisen wrote, "any action in FY 22? Has
10:50:41 10 United put a number on it yet? No word back from other
10:50:47 11 processor/refiners. I'll send along indications."

10:50:51 12 Did I read that correctly, sir?

10:50:52 13 A. You did.

10:50:53 14 Q. And when Mr. Wistisen wrote "no word back from other
10:50:57 15 processors/refiners," "I'll send along indications," you
10:51:01 16 understood him to be telling you that he would be in touch
10:51:05 17 if he heard from any of these other processors or refiners,
10:51:09 18 correct, sir?

10:51:09 19 A. Correct.

10:51:10 20 Q. And then you forwarded this e-mail exchange to your
10:51:14 21 boss, Mr. Swart, on February 15th at 3:50 p.m., correct,
10:51:18 22 sir?

10:51:18 23 A. Correct.

10:51:21 24 Q. And then the first thing you write is "I indicate
10:51:25 25 that you were surprised by both the beet and the Florida

Speece - direct

10:51:29 1 cane increases."

10:51:30 2 Do you see that?

10:51:30 3 A. I do.

10:51:32 4 Q. Now, Mr. Speece, if this is just a pricing survey
10:51:38 5 that you provide to Mr. Wistisen, an industry analyst, why
10:51:43 6 would it be important for you to indicate whether you were
10:51:46 7 surprised about price increases?

10:51:48 8 A. This is not referencing price increases.

10:51:52 9 Q. What is this referencing, sir?

10:51:53 10 A. This is referencing the size of the crops.

10:51:55 11 Q. Why would it be important for you to indicate that
10:51:58 12 you were surprised by that, sir?

10:51:59 13 A. I don't recall at this time.

10:52:01 14 Q. Okay. Mr. Speece, you then ask Mr. Swart if you
10:52:05 15 should indicate where United is at or, "just say our current
10:52:10 16 prices remain at 36.50 and 38.50 and we have had zero
10:52:15 17 problems selling at these values."

10:52:18 18 So you wanted your boss's opinion on what
10:52:21 19 information to relay to Mr. Wistisen; correct, sir?

10:52:24 20 A. Correct, around 2022.

10:52:28 21 Q. And then you say, "I will call him rather than put in
10:52:32 22 writing."

10:52:35 23 Mr. Speece, you communicate frequently with your
10:52:38 24 customers via e-mail in the ordinary course of business;
10:52:42 25 right, sir?

Speece - direct

10:52:43 1 A. I communicate with them on e-mail and on the phone.

10:52:46 2 Q. But you communicate with them frequently via e-mail,
10:52:50 3 correct, sir?

10:52:51 4 A. I communicate with them via e-mail.

10:52:53 5 Q. If you go back up to the main e-mail, Mr. Swart
10:52:57 6 responds to your e-mail the same day at 3:53 p.m., do you
10:53:01 7 see that?

10:53:01 8 A. Yes.

10:53:02 9 Q. And Mr. Swart also asked you to talk on the phone,
10:53:04 10 correct, sir?

10:53:04 11 A. Correct.

10:53:04 12 Q. And then a few minutes later, your boss, Mr. Swart,
10:53:10 13 calls up again and ask you again to give him a call,
10:53:13 14 correct?

10:53:14 15 A. Correct.

10:53:15 16 Q. Do you recall talking to Mr. Swart on the phone that
10:53:18 17 day, sir?

10:53:18 18 A. I do not recall.

10:53:20 19 Q. You don't recall what, if anything, Mr. Swart told
10:53:22 20 you to communicate to Mr. Wistisen, is that right?

10:53:22 21 A. On that particular call, no.

10:53:22 22 Q. Put that document aside.

10:53:23 23 Can you next please turn to tab PTX 406 in your
10:53:30 24 binder, sir.

10:54:00 25 Mr. Speece do you recognize this e-mail from

Speece - direct

10:54:03 1 February 2021, correct?

10:54:04 2 A. I see it's between me and Rich.

10:54:08 3 MR. THORNBURGH: Your Honor, plaintiffs move to
10:54:10 4 admit plaintiffs Exhibit 406 into evidence, please.

10:54:13 5 MS. GIORDANO: No objection.

10:54:14 6 THE COURT: Thank you. It's admitted.

10:54:15 7 (PTX Exhibit No. 406 was admitted into
10:54:16 8 evidence.)

10:54:16 9 BY MR. THORNBURGH:

10:54:17 10 Q. So I want to go to page 3 of this e-mail if we could,
10:54:20 11 Mr. Speece. And I want to look at the bottom, the e-mail at
10:54:25 12 the bottom of page 3 that carries over to page 4. And if
10:54:29 13 you look, here, Mr. Speece, this is in fact a continuation
10:54:33 14 of the e-mail conversation from the prior exhibit we were
10:54:36 15 just discussing. Is that right, sir?

10:54:40 16 A. Yes.

10:54:41 17 Q. And then I want to look at the e-mail in the middle
10:54:43 18 of the page on February 15th where you e-mail Mr. Wistisen.
10:54:51 19 Do you see that?

10:54:51 20 A. I do.

10:54:52 21 Q. And you wrote, in part, "we are until at the 36.50
10:54:55 22 and 38.50 with zero problems selling at those values. I do
10:55:00 23 not anticipate any changes to our prices, but we have not
10:55:04 24 formally decided."

10:55:05 25 That's what you wrote, correct, sir?

Speece - direct

10:55:07 1 A. Correct.

10:55:08 2 Q. And when you wrote "I do not anticipate any changes
10:55:11 3 to our prices," you were referencing what United might do to
10:55:17 4 its prices in the future, correct, sir?

10:55:18 5 A. I was stating my opinion there, yes.

10:55:20 6 Q. You were stating your opinion about what United might
10:55:23 7 do with its prices in the future, correct, sir?

10:55:26 8 A. Yes, that's my opinion.

10:55:29 9 Q. And Mr. Speece, this is the same proposed message
10:55:31 10 that you provided your boss, Mr. Swart, in the prior exhibit
10:55:31 11 that we just looked at, correct, sir?

10:55:31 12 A. Yes.

10:55:41 13 Q. Now, I want to go to page 2 of this exhibit, please,
10:55:41 14 Mr. Speece. And here Mr. Wistisen e-mails you on
10:55:41 15 February 17th, at 8:44 a.m. Do you see that?

10:55:51 16 A. I do.

10:55:51 17 Q. In the first couple sentences of this e-mail he
10:55:57 18 provides you pricing for NSM and Western, do you see that?

10:56:01 19 A. I do.

10:56:01 20 Q. And then Mr. Wistisen went on and he wrote "but
10:56:01 21 that's not how Cargill plays the game. And that's the
10:56:12 22 concerning part heading into the FY 22 booking season:
10:56:12 23 Improved and/or abundant supplies in the hands of the most
10:56:22 24 aggressive sellers."

10:56:22 25 Do you see that?

Speece - direct

10:56:26 1 A. I do.

10:56:26 2 Q. So when Mr. Wistisen referred to the "most concerning
10:56:32 3 part being approved and/or abundant supplies in the hands of
10:56:36 4 the market's most aggressive sellers," you understood him to
10:56:41 5 be expressing a concern about lower prices, correct, sir?

10:56:44 6 A. That appears to be Rich's opinion.

10:56:46 7 Q. And then if you go back out to the main e-mail, you
10:56:50 8 reply, and you wrote, "Thanks Rich. Call anytime."

10:56:56 9 Is that right?

10:56:57 10 A. Yes.

10:56:58 11 Q. If we can put that document aside, sir. I next ask
10:57:03 12 that you turn to PTX 426 in your binder. And you recognize
10:57:13 13 this e-mail stream, correct, sir?

10:57:15 14 A. I do.

10:57:17 15 MR. THORNBURGH: Your Honor, plaintiff moves to
10:57:19 16 admit plaintiff's Exhibit 426 into evidence, please.

10:57:23 17 MS. GIORDANO: No objection.

10:57:24 18 THE COURT: Thank you. It's admitted.

10:57:26 19 (PTX Exhibit No. 426 was admitted into
10:57:28 20 evidence.)

10:57:29 21 BY MR. THORNBURGH:

10:57:29 22 Q. Mr. Speece, this is another e-mail conversation
10:57:31 23 between you and Mr. Wistisen, this one from January 2021.
10:57:33 24 Correct, sir?

10:57:34 25 A. And between Dirk and Steve and I, yes.

Speece - direct

10:57:39 1 Q. I want to direct you to the bottom of page 2 of this
10:57:42 2 exhibit and there Mr. Wistisen ask you, has United put out a
10:57:48 3 price range on FY 22. Do you see that?

10:57:51 4 A. I do.

10:57:52 5 Q. Okay. And then you respond to this question from
10:57:55 6 Mr. Wistisen just a little bit further up the e-mail chain.
10:58:01 7 And you indicate here that United has very little sales for
10:58:05 8 the 2022 fiscal year and that the company has not yet set
10:58:11 9 pricing for 2022. Is that right, sir?

10:58:14 10 A. That's correct.

10:58:17 11 Q. In this e-mail, Mr. Speece, you were referring to
10:58:20 12 United sales for the 2022 fiscal year, correct, sir?

10:58:23 13 A. Referring to the price for the sales for 2022, yes.

10:58:31 14 Q. Thank you, sir.

10:58:33 15 And then I want to move up to the first page of
10:58:36 16 the document if we could. There is an e-mail from
10:58:38 17 Mr. Wistisen to you on Wednesday, January 20, 2021. Do you
10:58:41 18 see that?

10:58:45 19 A. I do.

10:58:48 20 Q. And Mr. Wistisen replies to your e-mail about 2022
10:58:52 21 pricing, correct, sir?

10:58:53 22 A. Correct.

10:58:56 23 Q. And he writes, "Very little so far on FY 22. One
10:58:58 24 processor saying they might start around \$35 net Midwest,
10:59:02 25 but fully expect it to go lower by couple dollars."

Speece - direct

10:59:08 1 Did I read that right?

10:59:10 2 A. You did.

10:59:12 3 Q. Now I want to go to the top e-mail here, please, sir.

10:59:18 4 In this e-mail you forwarded your prior conversation with
10:59:21 5 Mr. Wistisen to your boss, Mr. Swart, as well as Mr. Hanson,
10:59:28 6 your colleague at United, correct, sir?

10:59:31 7 A. Correct.

10:59:33 8 Q. You wrote, "My real concern is the one beet supplier
10:59:38 9 starting at \$35 net, likely NSM, and in my opinion it is not
10:59:45 10 necessary given they have the freight advantage into the
10:59:49 11 Midwest."

10:59:52 12 Mr. Speece, you were expressing a concern that
10:59:55 13 there was a competitor to United in the Midwest that had
10:59:59 14 pricing that was too low, correct, sir?

11:00:02 15 A. That's what I'm indicating.

11:00:05 16 Q. What did you mean by it is not necessary?

11:00:08 17 A. At that point in time I didn't have the supply and
11:00:12 18 demand warranted the 35.

11:00:17 19 Q. Then you wrote, "May want to communicate pricing
11:00:20 20 earlier than the colloquium to send a message."

11:00:22 21 That's what you wrote, right, sir?

11:00:24 22 A. That's what I wrote.

11:00:27 23 Q. Mr. Speece, did you consider calling NSM to let them
11:00:32 24 know that you were concerned about their pricing at the
11:00:35 25 time?

Speece - direct

11:00:35 1 A. Absolutely not.

11:00:37 2 Q. And in the colloquium that you referenced in your
11:00:40 3 e-mail here, sir, this is the annual sweeteners colloquium,
11:00:45 4 correct?

11:00:46 5 A. That's right.

11:00:46 6 Q. And this years sweeteners colloquium just took place
11:00:51 7 a month or two ago in Tucson, Arizona?

11:00:55 8 A. Correct.

11:00:56 9 Q. United attended the colloquium?

11:00:59 10 A. That's right.

11:01:00 11 Q. Did you attend this year, sir?

11:01:02 12 A. We did.

11:01:02 13 Q. And other beet processors attend the colloquium?

11:01:04 14 A. Yes.

11:01:07 15 Q. Other cane refiners?

11:01:08 16 A. Yes.

11:01:08 17 Q. Did you see ASR at the colloquium this year,

11:01:13 18 Mr. Speece?

11:01:13 19 A. I saw them, yes.

11:01:14 20 Q. Then you went on in your e-mail, "I will plan on
11:01:18 21 calling him tomorrow as it is always easier than black and
11:01:22 22 white. Let me know if there are any key messages you would
11:01:23 23 like me to relay on."

11:01:24 24 Mr. Speece, what kind of key messages would you
11:01:32 25 need to convey to someone doing a pricing survey?

Speece - direct

11:01:35 1 A. Simply asking a question, I don't know.

11:01:39 2 THE COURT: Why don't we take our morning break.

11:01:41 3 It's getting a little late.

11:01:43 4 (A brief recess was taken.)

11:19:40 5 THE COURT: All right. Please be seated. Let's
11:19:45 6 continue.

11:19:46 7 MR. THORNBURGH: May I proceed, Your Honor?

11:19:47 8 THE COURT: Yes, please.

11:19:48 9 BY MR. THORNBURGH:

11:19:49 10 Q. Can you please, Mr. Snow, pull up PTX 426 that we
11:19:54 11 were discussing previously. And Mr. Speece, if you could
11:19:57 12 please turn to that document in your binder.

11:20:01 13 Mr. Speece, you recall we were discussing this
11:20:12 14 document right before we went on the break, correct, sir?

11:20:15 15 A. I do.

11:20:15 16 Q. And I want to direct your attention back to the top
11:20:19 17 e-mail if we could. And then, the sentence where you wrote
11:20:22 18 the second paragraph, I'll plan on calling him tomorrow as
11:20:25 19 it is always easier than black and white. Mr. Speece, is
11:20:29 20 the reason that you indicated you would call Mr. Wistisen as
11:20:32 21 opposed to writing him an e-mail is because you didn't want
11:20:35 22 a written record of your communication with him?

11:20:38 23 A. No, I tend to prefer to communicate on the phone.

11:20:42 24 MR. STONEROCK: Mr. Speece, you can put that
11:20:45 25 document aside. I have no further questions for you at this

Speece - cross

11:20:45 1 time. Thank you.

11:20:46 2 THE COURT: All right. Thank you.

11:20:48 3 Cross-exam.

11:20:52 4 MS. GIORDANO: Good morning, Your Honor.

11:20:56 5 Jennifer Giordano from Latham & Watkins on behalf of the
11:21:01 6 defendants.

11:21:02 7 CROSS-EXAMINATION

11:21:02 8 BY MS. GIORDANO:

11:21:02 9 Q. Mr. Speece, you testified on the government's
11:21:04 10 question that you're responsible for some large industrial
11:21:07 11 customers like Hershey and Pepsi, is that right?

11:21:10 12 A. That's correct.

11:21:10 13 Q. How many customer accounts in total are you
11:21:12 14 responsible for at United?

11:21:14 15 A. Fourteen.

11:21:15 16 Q. And are those all large industrial, very large
11:21:19 17 industrial companies like Pepsi and Hershey?

11:21:21 18 A. Not all, but the majority.

11:21:23 19 Q. To whom do you report?

11:21:25 20 A. Dirk Swart.

11:21:27 21 Q. And who ultimately determines the price at which
11:21:31 22 United sells sugar to the customer accounts that you're
11:21:34 23 responsible for?

11:21:34 24 A. Dirk Swart.

11:21:35 25 Q. The government asked you about an e-mail that you had

Speece - cross

11:21:38 1 with Danone in 2019, it was PTX 395. Do you recall that
11:21:43 2 e-mail?

11:21:43 3 A. I do.

11:21:45 4 Q. For that particular bid to Danone, did you
11:21:49 5 subsequently find out whether you were actually competing
11:21:53 6 with Imperial for that business?

11:21:55 7 A. I did.

11:21:55 8 Q. What did you find out?

11:21:56 9 A. That they were not an approved supplier.

11:21:59 10 Q. How did you find that out?

11:22:00 11 A. Through the buyer at the time.

11:22:02 12 Q. Danone told you that?

11:22:03 13 A. Yes.

11:22:04 14 Q. Now, sir, with respect to these e-mails the
11:22:09 15 government showed you with Mr. Wistisen, let me just ask you
11:22:12 16 a couple of questions. Did you ever share any information
11:22:15 17 with Mr. Wistisen, that United was not freely sharing with
11:22:19 18 its customers at that same time?

11:22:21 19 A. No.

11:22:23 20 Q. All the prices in those e-mails that the government
11:22:26 21 showed you, were those all spot prices?

11:22:28 22 A. Yes.

11:22:30 23 Q. And those are sometimes called list prices?

11:22:32 24 A. Correct.

11:22:34 25 Q. Mr. Speece, did you ever share any information with

Speece - cross

11:22:39 1 Mr. Wistisen about a specific customer negotiation that
11:22:43 2 United was involved in?

11:22:45 3 A. No.

11:22:45 4 Q. Did you ever receive from Mr. Wistisen, any
11:22:49 5 information about a competitor, related to a specific
11:22:54 6 customer negotiation United was involved in?

11:22:56 7 A. No.

11:22:56 8 Q. To the best of your knowledge, sir, what role did the
11:23:03 9 information that you received from Mr. Wistisen play in the
11:23:08 10 price that any United customer paid for a shipper?

11:23:09 11 A. None.

11:23:10 12 MS. GIORDANO: Thank you, sir. I have no
11:23:11 13 further questions.

11:23:12 14 THE COURT: All right. Any redirect?

11:23:13 15 MR. THORNBURGH: No, Your Honor. Thank you.

11:23:14 16 THE COURT: Thank you, sir. You're excused.
11:23:17 17 What's next?

11:23:18 18 MR. GEIGER: Your Honor, at this time, United
11:23:20 19 States calls Alan Henderson.

11:23:22 20 THE COURT: All right. Thank you.

11:23:52 21 COURT CLERK: Please raise your right hand.
11:24:01 22 Please state and spell your full name for the record.

11:24:02 23 THE WITNESS: Alan Henderson, A-L-A-N,
11:24:14 24 H-E-N-D-E-R-S-O-N.

11:24:16 25 ALAN HENDERSON, having been duly sworn was

Henderson - direct

11:24:20 1 examined and testified as follows:

11:24:23 2 MR. GEIGER: Your Honor, David Geiger from the
11:24:27 3 United States. May I proceed?

11:24:28 4 THE COURT: Please.

11:24:29 5 DIRECT EXAMINATION

11:24:29 6 BY MR. GEIGER:

11:24:30 7 Q. Good morning, Mr. Henderson.

11:24:31 8 A. Good morning.

11:24:32 9 Q. Mr. Henderson, where do you currently work?

11:24:34 10 A. I work for Domino Foods in Iselin, New Jersey.

11:24:38 11 Q. What does Domino Foods broadly do?

11:24:41 12 A. Domino food is a marketing arm of American Sugar
11:24:44 13 Refining.

11:24:45 14 Q. And if I refer to American Sugar Refining as ASR,
11:24:50 15 will you understand that?

11:24:50 16 A. Yes.

11:24:51 17 Q. What is your current position at Domino Foods?

11:24:54 18 A. I am the vice-president of industrial sales.

11:24:56 19 Q. How long have you been in that position?

11:24:58 20 A. Approximately five years.

11:25:00 21 Q. What does industrial sales refer to?

11:25:04 22 A. Industrial sales is -- sells to manufacturers, like
11:25:10 23 railcars, bags, totes, liquid, things like that, mainly the
11:25:14 24 manufacturers throughout the country.

11:25:17 25 Q. And as vice-president of industrial sales, what are

Henderson - direct

11:25:20 1 your responsibilities?

11:25:21 2 A. I manage a team of eleven in our group throughout the
11:25:27 3 country. I have three direct reports, and I am basically
11:25:31 4 responsible for anything that has to do with industrial
11:25:33 5 sales whether it's selling, logistics, forecasting, things
11:25:38 6 like that.

11:25:38 7 Q. Are you familiar with Domino Foods's competitors for
11:25:43 8 refined sugar within the United States?

11:25:44 9 A. Yes.

11:25:45 10 Q. Do you have any responsibility with respect to
11:25:47 11 refined sugar prices for Domino foods?

11:25:50 12 A. I have responsibility for some of the industrial
11:25:53 13 pricing, yes.

11:25:54 14 Q. Do you have responsibility for approving certain
11:25:56 15 refined sugar prices?

11:25:58 16 A. Yes.

11:25:59 17 Q. Mr. Henderson, when setting Domino Food's prices, do
11:26:05 18 you consider feedback from customers?

11:26:07 19 A. Very much so.

11:26:08 20 Q. Do customers tell you about how your prices compare
11:26:12 21 to your competitor's prices?

11:26:13 22 A. I would say in most cases, yes.

11:26:15 23 Q. Mr. Henderson, in what ways can you use prices to
11:26:20 24 send a signal to competitors?

11:26:22 25 A. We really don't use pricing to send a signal to

Henderson - direct

11:26:27 1 competitors. We will give a quote to a customer, what they
11:26:31 2 do with that quote, a lot of them probably do what they do
11:26:34 3 with us, is pass it on to their supplier, and the customer
11:26:38 4 is signaling to us that you're not competitive or you're too
11:26:43 5 high in your price.

11:26:44 6 Q. Let's look at a document where signaling is
11:26:48 7 discussed. Please turn to tab PTX 055 in your white binder.

11:27:03 8 A. 055?

11:27:04 9 Q. Correct.

11:27:11 10 A. I have it, yes.

11:27:12 11 Q. Mr. Henderson, is this an e-mail chain you sent and
11:27:15 12 received in June 2020?

11:27:18 13 A. Correct.

11:27:19 14 MR. GEIGER: Your Honor, I move for admission of
11:27:21 15 PTX 055.

11:27:23 16 MR. YATES: No objection, Your Honor.

11:27:24 17 THE COURT: All right. Thank you.

11:27:25 18 (PTX Exhibit No. 055 was admitted into
11:27:26 19 evidence.)

11:27:28 20 BY MR. GEIGER:

11:27:29 21 Q. Mr. Henderson, parts of this document have been
11:27:31 22 redacted so, please don't identify the potential customer
11:27:33 23 discussed here. But without doing that, what broadly is the
11:27:35 24 topic of this e-mail?

11:27:36 25 A. It looks like a customer of ours requesting a quote.

Henderson - direct

11:27:41 1 Q. The third e-mail down is from Mr. Whittaker to you,
11:27:46 2 is that right?

11:27:47 3 A. Yes.

11:27:47 4 Q. Does Mr. Whittaker report to you?

11:27:49 5 A. Yes, he does.

11:27:50 6 Q. Do you see that Mr. Whittaker wrote, "Rob is
11:27:53 7 suggesting at," and then a price?

11:27:58 8 A. I do.

11:27:59 9 Q. Let's look at your response higher up the page. You
11:28:04 10 responded and you wrote, "I would love to get aggressive
11:28:07 11 here, but Rob S does not want to lower the bar."

11:28:10 12 Do you see that?

11:28:10 13 A. Yes.

11:28:11 14 Q. Who was Rob S?

11:28:13 15 A. That would be Rob Sproull.

11:28:15 16 Q. Do you know that he testified before you today?

11:28:18 17 A. That was my understanding.

11:28:21 18 Q. In your e-mail you continued, "we would like to avoid
11:28:25 19 sending a signal out to competitors that we are chasing
11:28:28 20 business and lowering pricing off the standard \$41 bulk
11:28:32 21 basis."

11:28:32 22 Do you see that?

11:28:34 23 A. Yes.

11:28:35 24 Q. What competitors were you referring to when you
11:28:38 25 wrote, we would like to avoid sending a signal out to

Henderson - direct

11:28:41 1 competitors?

11:28:42 2 A. In this particular incident with this customer, we
11:28:47 3 really don't sell them, so they have a history of asking us
11:28:51 4 for pricing and it's usually very low pricing. So our
11:28:55 5 thought process is, we go down and match that price that
11:28:58 6 they're not going to give us the business, they're just
11:29:01 7 going to go back and tell their supplier where our pricing
11:29:04 8 is, so it's really like a customer sending a signal to
11:29:07 9 someone else, I would assume.

11:29:09 10 Q. Let's look at the second page. There is a table on
11:29:12 11 the second page, Mr. Henderson?

11:29:14 12 A. Yes.

11:29:15 13 Q. Which competitors are listed in this table?

11:29:18 14 A. That is Imperial and United.

11:29:21 15 Q. Are these the competitors you were referencing in
11:29:24 16 your e-mail on two first page?

11:29:25 17 A. That's what we're assuming in this particular case,
11:29:28 18 whether the customer told Rob Weston that or not, it's
11:29:31 19 possibly.

11:29:32 20 Q. Sir, let's talk about some other ways information
11:29:35 21 flows to and from competitors. Do you know a Richard
11:29:40 22 Wistisen?

11:29:42 23 A. I know Richard Wistisen from his magazine, yes.

11:29:44 24 Q. Who is he?

11:29:47 25 A. He is an analyst that's involved with commodity

Henderson - direct

11:29:51 1 specialist, commodity information is the publication he puts
11:29:54 2 out.

11:29:54 3 Q. How do you know him?

11:29:56 4 A. When I first started in this position, our
11:29:59 5 vice-president that was in the position said that he would
11:30:02 6 get an e-mail approximately once a month from Mr. Wistisen
11:30:05 7 about general market information and he would just, our
11:30:09 8 ex-vice-president would supply him with our general pricing
11:30:12 9 and basically, you know, general coverage throughout the
11:30:15 10 country.

11:30:16 11 Q. Do you communicate with Mr. Wistisen?

11:30:18 12 A. I communicate by e-mail with Mr. Wistisen about once
11:30:21 13 a month.

11:30:22 14 Q. Is he a Domino Foods customer?

11:30:24 15 A. No, he's not.

11:30:26 16 Q. Is he a Domino Foods broker?

11:30:28 17 A. No.

11:30:30 18 Q. Do you communicate with Mr. Wistisen by any way
11:30:33 19 besides e-mail?

11:30:35 20 A. Just e-mail.

11:30:37 21 Q. Who, if anyone, at Domino is aware that you
11:30:40 22 communicate with Mr. Wistisen?

11:30:42 23 A. I would say that most of the people involved with
11:30:45 24 industrial sales, you know, there is four or five analyst
11:30:48 25 publications out there that we communicate and it's just the

Henderson - direct

11:30:52 1 general information, you know, their publication comes out
11:30:57 2 and I would say so myself, Adam, some other folks in
11:31:01 3 industrial sales, Mr. Sproull.

11:31:03 4 Q. Is Mr. Sproull aware that you communicate with
11:31:06 5 Mr. Wistisen?

11:31:06 6 A. Yes.

11:31:08 7 Q. What is your understanding as to how Mr. Wistisen
11:31:11 8 gets the information that he puts into his report?

11:31:14 9 A. I think he does a general survey of the industry,
11:31:19 10 including suppliers, brokers, customers, trade people, raw
11:31:24 11 sugar people, maybe even weather people, analyst, he does a
11:31:31 12 lot of crop reports things like that.

11:31:31 13 Q. By suppliers are you referring to your competitors?

11:31:36 14 A. I would assume so, I think most people in the
11:31:39 15 industry supply that information.

11:31:41 16 Q. Have you ever provided Mr. Wistisen with Domino's
11:31:45 17 prices for refined sugar?

11:31:47 18 A. I provided him with our general price guideline, yes.

11:31:50 19 Q. Are those spot prices?

11:31:52 20 A. They could be two things, sometimes these analysts
11:31:56 21 ask for spot pricing which is the current pricing today,
11:31:58 22 sometimes they ask for a price say in calendar '23, so that
11:32:00 23 price in calendar '23 is based off of 16 boards that can
11:32:02 24 change on a daily basis.

11:32:04 25 Q. And that example price for '23, is that a forward

Henderson - direct

11:32:13 1 price?

11:32:13 2 A. We kind of refer to it as a contract price or a
11:32:16 3 request for quote, so the customer say today was asking for
11:32:20 4 pricing for June of '23, we could provide a quote based off
11:32:25 5 of 16, but everything is subject to confirmation because it
11:32:29 6 changes daily.

11:32:32 7 Q. So you would provide a contract price and a spot
11:32:36 8 price to Mr. Wistisen, is that correct?

11:32:37 9 A. Well, I would call it general price guidelines,
11:32:41 10 right. The period say being today, being spot, a period
11:32:45 11 next year is just 16 pricing and just where our what our
11:32:51 12 general guidelines are.

11:32:51 13 Q. Do you consider United to be a competitor?

11:32:54 14 A. Yes.

11:32:55 15 Q. How honest do you believe United is with the
11:32:59 16 information they provide Mr. Wistisen?

11:33:01 17 A. You know, I'm skeptical on a lot of reports I receive
11:33:07 18 from the trade analysts, brokers, sometimes even customers.
11:33:11 19 Most of our customers are repetitive customers so there are
11:33:15 20 very good relationships, so we put a lot more merit in
11:33:19 21 customer feedback than we do in the analysts.

11:33:21 22 Q. Mr. Henderson, my question is how honest do you
11:33:25 23 believe United is with the information they provide
11:33:27 24 Mr. Wistisen?

11:33:28 25 A. I couldn't answer that. I have no idea.

Henderson - direct

11:33:31 1 Q. Let's look at another document. Please turn to PTX
11:33:35 2 048 in your binder. Are you there?

11:33:46 3 A. I want to make sure it's 048.

11:33:48 4 Q. 048.

11:33:52 5 A. Yes.

11:33:53 6 Q. Is this an e-mail chain you sent and received in
11:33:57 7 February 2021?

11:33:59 8 A. Sorry, I was -- yes, 048 is, yes.

11:34:06 9 MR. GEIGER: Your Honor, I move for admission of
11:34:07 10 PTX 048.

11:34:09 11 MR. YATES: No objection, Your Honor.

11:34:10 12 THE COURT: Thank you. It's admitted.

11:34:12 13 (PTX Exhibit No. 048 was admitted into
11:34:13 14 evidence.)

11:34:13 15 BY MR. GEIGER:

11:34:14 16 Q. At the bottom of the first page, Mr. Wistisen wrote
11:34:17 17 you an e-mail. Do you see that?

11:34:21 18 A. Yes, February 17th.

11:34:21 19 Q. And you forwarded Mr. Wistisen's e-mail to Adam
11:34:32 20 Whittaker?

11:34:42 21 A. Yes.

11:34:42 22 Q. When you wrote, "United is usually pretty upfront
11:34:43 23 with Rich."

11:34:44 24 What did you mean by upfront?

11:34:52 25 A. Well, I think all the suppliers want to give somewhat

Henderson - direct

11:34:55 1 accurate information to these publications because they're
11:34:58 2 used for the whole trade and even the USDA references them,
11:35:02 3 so I would think they would have to be somewhat accurate.

11:35:05 4 Q. Let's take a closer look at the e-mail Mr. Wistisen
11:35:10 5 sent to you on the second page. And you see that
11:35:13 6 Mr. Wistisen wrote in part, "long conversation with United.
11:35:18 7 Won't set FY 22 price list until March, but the plan remains
11:35:22 8 to hold steady at 36.50 and 38.50 based on demand,
11:35:27 9 inventories, number 16."

11:35:29 10 Do you see that?

11:35:30 11 A. I do.

11:35:30 12 Q. Now, when Mr. Wistisen wrote to you, the plan remains
11:35:35 13 to hold steady at 36.50 and 38.50, whose plans do you
11:35:40 14 understand that to refer?

11:35:40 15 A. I didn't give a lot of thought but looking at it I
11:35:45 16 would assume he is speaking about United.

11:35:50 17 Q. Let's look at another communication with
11:35:55 18 Mr. Wistisen. Please turn to Tab 064 in your binder.

11:36:00 19 A. Yes, I have it.

11:36:05 20 Q. Sir, is this an e-mail chain between you and
11:36:10 21 Mr. Wistisen in June and July of 2021?

11:36:11 22 A. Yes, it is.

11:36:12 23 MR. GEIGER: Your Honor, I move for admission of
11:36:14 24 PTX 064.

11:36:15 25 MR. YATES: No objection, Your Honor.

Henderson - direct

11:36:19 1 THE COURT: Thank you. It's admitted.

11:36:20 2 (PTX Exhibit No. 064 was admitted into

11:36:21 3 evidence.)

11:36:21 4 BY MR. GEIGER:

11:36:22 5 Q. Let's go to the fifth page ending 241 in the bottom

11:36:27 6 corner. At the bottom of this page is an e-mail from

11:36:30 7 Mr. Wistisen to you dated June 17th. Do you see that?

11:36:34 8 A. Yes.

11:36:36 9 Q. Turn to the next page toward the bottom, Mr. Wistisen

11:36:40 10 wrote, "what are you seeing on the price and demand side of

11:36:41 11 things?"

11:36:45 12 Do you see that?

11:36:46 13 A. Yes, I do.

11:36:48 14 Q. For what product do you understand Mr. Wistisen is

11:36:50 15 asking you about price and demand?

11:36:52 16 A. I think he's asking about a general pricing, or price

11:36:56 17 guidelines that we have, and just basically how the market

11:36:58 18 is out there.

11:37:00 19 Q. For refined sugar, correct?

11:37:03 20 A. Yes.

11:37:05 21 Q. Mr. Wistisen then wrote, "I'm just getting going on

11:37:09 22 pricing but have heard a bit NSM 35-36 net RRV, 37 net west,

11:37:12 23 claiming to be close to sold out at Brawley, 70 percent

11:37:22 24 Renville, but only 40 percent booked amalgamated."

11:37:25 25 Do you see that?

Henderson - direct

11:37:27 1 A. Yes, I do?

11:37:28 2 Q. What do you understand RRV to mean?

11:37:30 3 A. Red River Valley.

11:37:32 4 Q. What do you understand the phrase sold out to mean?

11:37:35 5 A. Sold out is an interesting term for beets because
11:37:38 6 it's really based on the crop size, so they have a limited
11:37:42 7 amount of crop, so when their crop is done, they can't
11:37:47 8 import beet sugar, so that's basically their crop is their
11:37:51 9 process. And that report comes out in numerous
11:37:54 10 publications.

11:37:56 11 Q. Do you understand that Mr. Wistisen is telling you
11:37:58 12 that NSM is sold out of beets at their Brawley facility, is
11:38:01 13 that right?

11:38:05 14 A. I think he wrote they're claiming to be.

11:38:10 15 Q. Mr. Wistisen then wrote, "United reportedly, I'll
11:38:14 16 talk with them tomorrow, holding 36.50 gross."

11:38:16 17 Do you see that?

11:38:18 18 A. Yes.

11:38:21 19 Q. What do you understand the phrase 36.50 gross to
11:38:24 20 refer to?

11:38:26 21 A. That's general pricing I guess that they put out as
11:38:29 22 their price guidance to various people and publications and
11:38:32 23 Milling and Baking, things like that.

11:38:34 24 Q. For United?

11:38:36 25 A. I think most processors and refiners do that, yes.

Henderson - direct

11:38:42 1 Q. Is this price here a reference for United?

11:38:47 2 A. Yes, Rich noted that, yes.

11:38:50 3 Q. What do you understand the phrase, "I'll talk with
11:38:53 4 them tomorrow" to mean?

11:38:56 5 A. You know, I never asked or cared how Rich
11:39:00 6 communicated with the trade or brokers and suppliers. I
11:39:04 7 know I just did it by e-mail. To me that was very
11:39:07 8 transparent.

11:39:08 9 Q. You understood that Mr. Wistisen intended to talk
11:39:11 10 with United the following day, is that right?

11:39:13 11 A. Yeah, I think he talks to almost everybody in the
11:39:16 12 trade.

11:39:16 13 Q. Mr. Wistisen then wrote, "and that southeast has
11:39:21 14 slipped below \$38."

11:39:24 15 Do you see that?

11:39:24 16 A. Yes.

11:39:25 17 Q. What do you understand the southeast to mean here?

11:39:27 18 A. Southeast in these publications usually refers to
11:39:31 19 Florida.

11:39:34 20 Q. Let's go back to the forth page, and in 241. In the
11:39:40 21 middle of that page you wrote back to Mr. Wistisen on
11:39:45 22 June 18th, is that correct?

11:39:46 23 A. Correct.

11:39:46 24 Q. You wrote "October to December 21st, East/West Coast,
11:39:52 25 \$44 gross, FOB bulk basis, Gulf \$42 gross FOB bulk basis."

Henderson - direct

11:40:00 1 Do you see that?

11:40:00 2 A. I do.

11:40:00 3 Q. Are those Domino general list pricing numbers?

11:40:05 4 A. Yes.

11:40:05 5 Q. For refined sugar?

11:40:06 6 A. Yes, sir.

11:40:08 7 Q. And with respect to contract prices, Mr. Henderson,
11:40:10 8 is a Domino customer able to take a spot price and convert
11:40:14 9 it to a contract price?

11:40:16 10 A. It really depends on the period, so a spot price is
11:40:19 11 basically that week, it could be converted to thirty-day
11:40:23 12 contract because it's usually the same trading period. So
11:40:27 13 if you're in a July period, you're trading against the July
11:40:31 14 futures, so it's the same number for that month. In most
11:40:35 15 cases, when you go out a different quarter it's different
11:40:39 16 pricing because of the 16 market.

11:40:41 17 Q. Mr. Henderson, a customer can take a spot price and
11:40:46 18 turn it into a contract price, correct?

11:40:47 19 A. Yes, but not necessarily at the same price.

11:40:50 20 Q. Sometimes at the same price?

11:40:52 21 A. Depending on the period and the product. There is
11:40:55 22 many variables that go into that decision.

11:40:58 23 Q. Sir, did you ever ask Mr. Wistisen what he would do
11:41:02 24 with the information you provided?

11:41:04 25 A. No, I just assumed when I took over the position that

Henderson - direct

11:41:07 1 he for the thirty past years before this one, if there was
11:41:10 2 ever information, they were supplying the information out to
11:41:13 3 the trade, he would gather his monthly information and put
11:41:16 4 it together in a report.

11:41:17 5 Q. Did you ever tell Mr. Wistisen that he should not
11:41:20 6 share Domino Foods' pricing information with your
11:41:23 7 competitors?

11:41:24 8 A. Everything I told him was for public knowledge to put
11:41:27 9 in his publication. Now who he shared that with, that was
11:41:31 10 his prerogative, but for me, I never told him not to share,
11:41:35 11 not to put anything in his report that I told him.

11:41:38 12 Q. You're aware that he shared your information with
11:41:41 13 competitors, correct?

11:41:42 14 A. I have never seen it myself. I am assuming that, you
11:41:47 15 know, he surveys the market and talks about the market in
11:41:50 16 general and then he informs everyone in the trade through
11:41:53 17 his report, usually out the next day.

11:41:54 18 Q. He has a monthly report, sir?

11:42:01 19 A. Yes.

11:42:01 20 Q. You communicate with him more than once a month,
11:42:05 21 don't you?

11:42:05 22 A. I would say in most cases, maybe ten months out of
11:42:09 23 the year it's once a month. Sometimes there are certain
11:42:12 24 incidents that happen in the industry and weather, things
11:42:15 25 like that.

Henderson - direct

11:42:16 1 Q. Do you provide accurate prices to Mr. Wistisen?

11:42:20 2 A. I would call them price guidelines. Every bid we
11:42:24 3 look at, every contract we do has unique circumstances and
11:42:29 4 different pricing.

11:42:30 5 Q. Those are prices, are they not, sir?

11:42:34 6 A. Those are general price guidelines, yes.

11:42:39 7 Q. Let's go to the middle of page 240, the third page.

11:42:46 8 A. Yes.

11:42:47 9 Q. And middle, Mr. Wistisen asked you where would you
11:42:50 10 put forward pricing and coverage. Do you see that?

11:42:54 11 A. I do.

11:42:56 12 Q. Let's go to the third page ending in 239 where you
11:42:59 13 responded to Mr. Wistisen on July 12th. Do you see that?

11:43:03 14 A. Yes.

11:43:04 15 Q. And you wrote in the third paragraph, "For fiscal
11:43:07 16 year '22, close to 65 percent booked and moving prices up."

11:43:13 17 Do you see that?

11:43:14 18 A. I do.

11:43:14 19 Q. What does close to 65 percent booked refer to?

11:43:18 20 A. When we do our forecasting we come up with a number
11:43:22 21 for the year, so it's really 65 is basically our estimated
11:43:23 22 forecast for industrial sales.

11:43:24 23 Q. That is your sold position, isn't it?

11:43:31 24 A. That is our sold position against our forecasts, yes.

11:43:32 25 Q. Let's go to the first page. At the bottom

Henderson - direct

11:43:39 1 Mr. Wistisen wrote to you on July 16th. Do you see that?

11:43:43 2 A. Yes.

11:43:43 3 Q. And he wrote, "I don't understand it, but this is the
11:43:46 4 word from United, 80 to 85 percent sold, will be over 90
11:43:51 5 very soon." Do you see that?

11:43:53 6 A. I do.

11:43:54 7 Q. That is United's sold position, isn't it?

11:43:58 8 A. I would assume that's what he was referring to.

11:44:01 9 Q. And then he asked you, any changes in ASR forward
11:44:07 10 prices. Right?

11:44:08 11 A. Yes.

11:44:08 12 Q. So the first page, and you responded to Mr. Wistisen,
11:44:17 13 and you said we are now 40.50 Gulf, 43 FOB East and West
11:44:24 14 Coast. Do you see that?

11:44:25 15 A. I do.

11:44:25 16 Q. Those are ASR forward prices, correct?

11:44:27 17 A. Yes.

11:44:28 18 Q. Now moving up one e-mail, Mr. Wistisen then wrote to
11:44:32 19 you on July 16th at 10:37 a.m., do you see that?

11:44:32 20 A. Yes, sir.

11:44:32 21 Q. That's the same day as this e-mail at the bottom of
11:44:32 22 the page, correct?

11:44:42 23 A. Yes, July 16th.

11:44:42 24 Q. And he wrote to you and said, "the United info I
11:44:50 25 provided was direct from them this morning. They held a big

Henderson - direct

11:44:54 1 huddle yesterday (sounded like all sales reps/VP were
11:44:59 2 present) and those numbers were the result."

11:45:01 3 Do you see that?

11:45:02 4 A. Yes, sir.

11:45:03 5 Q. Now, you understand that the information that
11:45:05 6 Mr. Wistisen provided to you came directly from United that
11:45:11 7 morning, correct?

11:45:12 8 A. What he wrote is it seemed like he spoke to them. I
11:45:16 9 have no idea of what manner of communication he spoke to
11:45:19 10 them.

11:45:19 11 Q. But you understand that the information he provided
11:45:22 12 came directly from United that morning, correct?

11:45:21 13 A. Yes, reading that, I would say yes.

11:45:28 14 Q. Mr. Henderson, would you call United to ask them
11:45:31 15 their pricing information?

11:45:32 16 A. No, I would not.

11:45:33 17 Q. Would you call United to ask them their sold
11:45:36 18 position?

11:45:36 19 A. No, sir.

11:45:37 20 Q. Why not?

11:45:37 21 A. Because we've always been trained in your company not
11:45:41 22 to speak to competitors, not to have even a simple
11:45:42 23 discussion.

11:45:42 24 Q. But you received United pricing information through
11:45:50 25 Mr. Wistisen, didn't you?

Henderson - direct

11:45:51 1 A. I receive pricing information from many, many sources
11:45:54 2 all day long, all month long, did I receive that from Rich,
11:45:58 3 I take that just as another bit of information, whether it's
11:46:01 4 accurate or not, I have no idea.

11:46:02 5 Q. You believe that United is upfront with Mr. Wistisen,
11:46:05 6 don't you?

11:46:06 7 A. I think they're upfront as far as like their general
11:46:09 8 pricing, like we do, this is information that's gathered by
11:46:14 9 many sources including the United States Department of
11:46:17 10 Agriculture, so we want to be somewhat accurate, yes.

11:46:19 11 Q. Let's take a step back, Mr. Henderson. You have
11:46:23 12 communicated with Mr. Wistisen on other occasions than what
11:46:26 13 is in Exhibit 64 that we just looked at, correct?

11:46:29 14 A. Yes.

11:46:29 15 Q. And on those other occasions, you have provided
11:46:33 16 Domino's pricing for refined sugar, correct?

11:46:35 17 A. I'm sorry, repeat the question.

11:46:37 18 Q. You have provided Domino's pricing for refined sugar
11:46:41 19 on other occasions?

11:46:42 20 A. Our current pricing guidelines.

11:46:44 21 Q. And you have also provided Domino Foods' forward
11:46:47 22 pricing for refined sugar, correct?

11:46:49 23 A. What we would assume to be a different trade period,
11:46:52 24 yes.

11:46:52 25 Q. And you have provided Domino Foods' sold position of

Henderson - direct

11:46:56 1 refined sugar to Mr. Wistisen, correct?

11:46:59 2 A. Yes, our general number.

11:47:01 3 Q. You also received your competitor pricing for refined
11:47:04 4 sugar from Mr. Wistisen, correct?

11:47:06 5 A. Yes, either through him or through his publication at
11:47:09 6 the same time.

11:47:09 7 Q. And their booked position of refined sugar, correct?

11:47:12 8 A. I think what Mr. Wistisen does, he takes everybody's
11:47:16 9 general position of bookings and he puts it in his report
11:47:19 10 about where capacity is in the United States.

11:47:22 11 Q. Let's explore these other communications for a few
11:47:25 12 minutes. Please turn to tab PTX 051 in your binder. Is
11:47:38 13 this an e-mail chain between you and Mr. Wistisen in
11:47:42 14 September 2020?

11:47:42 15 A. Yes.

11:47:43 16 MR. GEIGER: Your Honor, I move for admission of
11:47:44 17 PTX 051.

11:47:46 18 MR. YATES: No objection, Your Honor.

11:47:47 19 THE COURT: All right. Thank you. It's
11:47:48 20 admitted.

11:47:49 21 (PTX Exhibit No. 051 was admitted into
11:47:50 22 evidence.)

11:47:50 23 BY MR. GEIGER:

11:47:50 24 Q. Let's go to the third page. Mr. Wistisen e-mailed
11:47:51 25 you there, do you see that?

Henderson - direct

11:47:55 1 A. That's page 150, sir.

11:48:01 2 Q. Yes.

11:48:02 3 A. Yes.

11:48:02 4 Q. At the very bottom he asked you where would you put
11:48:06 5 ASR prices in FY 21 or 2021 coverage. Do you see that?

11:48:11 6 A. I do.

11:48:11 7 Q. Go back to the middle of the second page. And there
11:48:16 8 you provided Mr. Wistisen with Domino Foods' prices,
11:48:21 9 correct?

11:48:21 10 A. Those are our general price guidelines, yes.

11:48:25 11 Q. You also wrote higher levels for the
11:48:30 12 October/December 20 period as most cane and beet companies
11:48:31 13 are well sold and/or filling past force majeure volume. Do
11:48:37 14 you see that?

11:48:37 15 A. Yes.

11:48:38 16 Q. Higher levels means higher prices, correct?

11:48:43 17 A. I would assume so. I mean, it could also refer to
11:48:47 18 number 16 values, but that could also tie into higher
11:48:54 19 refined prices.

11:48:55 20 Q. There are higher prices because the sugar refiners
11:48:58 21 were quote "well sold", correct?

11:49:00 22 A. Well, what happened in 2020 there was a terrible
11:49:04 23 weather incident and United Sugar and Western declared force
11:49:09 24 majeure. They didn't have any crop left because of the
11:49:12 25 weather.

Henderson - direct

11:49:12 1 Q. But you also said because they were well sold,
11:49:16 2 correct?

11:49:16 3 A. I don't know if it was well sold or they ran out of
11:49:19 4 stock.

11:49:20 5 Q. Let's look at another e-mail. Please turn to tab PTX
11:49:25 6 049.

11:49:28 7 A. Yes.

11:49:28 8 Q. This is an e-mail chain between you and Mr. Wistisen
11:49:32 9 this time in November 2020, correct?

11:49:34 10 A. Correct.

11:49:35 11 MR. GEIGER: Your Honor, I move for admission of
11:49:37 12 PTX 049.

11:49:38 13 MR. YATES: No objection, Your Honor.

11:49:40 14 THE COURT: Thank you. It's admitted.

11:49:41 15 (PTX Exhibit No. 049 was admitted into
11:49:42 16 evidence.)

11:49:42 17 BY MR. GEIGER:

11:49:42 18 Q. Let's look at the bottom of the first page, you wrote
11:49:45 19 to Mr. Wistisen, correct?

11:49:46 20 A. Yes.

11:49:47 21 Q. And you wrote for calendar 20 with 21, east/west, \$42
11:49:52 22 FOB. Right?

11:49:52 23 A. Yes.

11:49:52 24 Q. And that referred to Domino's price for refined sugar
11:49:52 25 in the following year, correct?

Henderson - direct

11:50:02 1 A. That is for calendar '21, that is correct.

11:50:05 2 Q. And you wrote this in 2020?

11:50:07 3 A. I wrote that in November of 2020, a month-and-a-half
11:50:10 4 away.

11:50:11 5 Q. Now, in the next page, you also told Mr. Wistisen
11:50:15 6 that Domino's sold position of refined cane sugar was 85 to
11:50:24 7 90 percent, right?

11:50:25 8 A. I wrote cane coverage so that's an assumption that
11:50:27 9 you made from reading other publications, listening to
11:50:31 10 customers what everything in the cane industry did.

11:50:34 11 Q. Is it your testimony that is not Dominos Foods' sold
11:50:38 12 position?

11:50:39 13 A. It's my testimony looking at this that it looks like
11:50:42 14 when I put cane coverage I'm talking about in totality in
11:50:46 15 the industry.

11:50:47 16 Q. Let's go to tab PTX 059.

11:50:58 17 Sir, here we have another e-mail chain primarily
11:51:01 18 between you and Mr. Wistisen, this time in April/May 2021,
11:51:04 19 is that correct?

11:51:08 20 A. Correct.

11:51:09 21 MR. GEIGER: Your Honor, I move for admission of
11:51:12 22 PTX 059.

11:51:13 23 MR. YATES: No objection, Your Honor.

11:51:14 24 THE COURT: Thank you. It's admitted.

11:51:15 25 (PTX Exhibit No. 059 was admitted into

Henderson - direct

11:51:16 1 evidence.)

11:51:16 2 BY MR. GEIGER:

11:51:18 3 Q. Now, sir, you forwarded this e-mail chain to
11:51:22 4 Mr. Whittaker, Mr. Dahlman, and Mr. Williams at the top. Do
11:51:36 5 you see that?

11:51:37 6 A. I'm sorry, I'm looking for that. What is the date?

11:51:41 7 Q. 059, top of the first page.

11:51:51 8 A. I'm sorry, what was the tab number, was it 059?

11:51:55 9 Q. 059.

11:51:57 10 A. Yes. I got it. I got it.

11:51:59 11 Q. And you forwarded this to Mr. Whittaker, Mr. Dahlman
11:52:04 12 and Mr. Williams?

11:52:05 13 A. Yes, I did.

11:52:05 14 Q. Now the e-mail you forwarded from Mr. Wistisen
11:52:08 15 included this statement "only about 40 percent covered. But
11:52:12 16 expect big action over the next month. 20 plus percent add
11:52:16 17 to bookings and at that time, expect to raise prices and not
11:52:20 18 by just a dollar."

11:52:21 19 Correct?

11:52:22 20 A. Correct.

11:52:24 21 Q. And you understood that statement to be about United,
11:52:27 22 correct?

11:52:28 23 A. When you read the paragraph in total, yes, I would
11:52:32 24 assume that it is United.

11:52:35 25 Q. We have a few more examples, Mr. Henderson, please

Henderson - direct

11:52:38 1 turn to tab PTX 039.

11:52:55 2 A. I have it.

11:52:55 3 Q. This is another e-mail chain relating to Mr. Wistisen
11:52:59 4 that you sent and received in March 2021; is that correct?

11:53:03 5 A. Correct.

11:53:04 6 MR. GEIGER: Your Honor, I move for admission of
11:53:05 7 PTX 039.

11:53:07 8 MR. YATES: No objection.

11:53:08 9 THE COURT: Thank you. It's admitted.

11:53:09 10 (PTX Exhibit No. 039 was admitted into
11:53:10 11 evidence.)

11:53:10 12 BY MR. GEIGER:

11:53:11 13 Q. Now, here Mr. Henderson, you forwarded an e-mail from
11:53:14 14 Mr. Wistisen to your boss, Mr. Sproull, is that right?

11:53:18 15 A. Correct.

11:53:18 16 Q. You told him this was market intelligence, correct?

11:53:21 17 A. Yes.

11:53:21 18 Q. And that market intelligence included information on
11:53:25 19 your competitors inventory of refined sugar, correct?

11:53:30 20 A. I'm not seeing where it says inventory, but I can
11:53:42 21 look again.

11:53:42 22 Q. It says NSM and Western have inventory to move?

11:53:47 23 A. Yes.

11:53:47 24 Q. And United tight at 36.50?

11:53:52 25 A. Yes. I probably sent Rob Sproull various information

Henderson - direct

11:53:58 1 throughout the week from customers, analyst, publications,
11:54:01 2 things like that, just one of many.

11:54:03 3 Q. You sent him this information which you considered
11:54:07 4 market intelligence from Mr. Wistisen, isn't that right?

11:54:11 5 A. Yes.

11:54:11 6 Q. Please turn to Tab 065. Sir, this is another e-mail
11:54:24 7 chain between you and Mr. Wistisen, this time August 2020,
11:54:28 8 is that right?

11:54:28 9 A. Correct.

11:54:29 10 MR. GEIGER: Your Honor, I move for admission of
11:54:30 11 PTX 065.

11:54:32 12 MR. YATES: No objection, Your Honor.

11:54:33 13 THE COURT: Thank you. It's admitted.

11:54:35 14 (PTX Exhibit No. 065 was admitted into
11:54:36 15 evidence.)

11:54:36 16 BY MR. GEIGER:

11:54:36 17 Q. Let's go to another one, Mr. Henderson, please turn
11:54:40 18 to PTX 043. Now this is another e-mail chain between you
11:54:41 19 and Mr. Wistisen, this time in September of 2019, is that
11:54:50 20 correct?

11:54:50 21 A. That is correct.

11:54:51 22 MR. GEIGER: Your Honor, I move for admission of
11:54:53 23 PTX 043.

11:54:54 24 MR. YATES: No objection.

11:54:55 25 THE COURT: All right. It's admitted.

Henderson - direct

11:54:56 1 (PTX Exhibit No. 043 was admitted into
11:54:59 2 evidence.)

11:54:59 3 BY MR. GEIGER:

11:54:59 4 Q. Let's do one more. Please turn to tab PTX 063, sir.

11:55:11 5 A. I have it.

11:55:12 6 Q. This is another e-mail chain between you and
11:55:15 7 Mr. Wistisen in June and July 2021, isn't it?

11:55:18 8 A. That's correct.

11:55:19 9 MR. GEIGER: Your Honor, I move for admission of
11:55:21 10 PTX 063.

11:55:21 11 MR. YATES: No objection.

11:55:23 12 THE COURT: All right. It's admitted.

11:55:25 13 (PTX Exhibit No. 063 was admitted into
11:55:25 14 evidence.)

11:55:25 15 BY MR. GEIGER:

11:55:27 16 Q. On the top of the first page you forwarded the e-mail
11:55:30 17 chain to Mr. Whittaker, Mr. Duhlman and Mr. Williams, do you
11:55:35 18 see that?

11:55:35 19 A. Yes.

11:55:38 20 Q. You told them FYI below, United had price increase,
11:55:40 21 is that correct?

11:55:40 22 A. Yes.

11:55:42 23 Q. And you told them let's see if we can hunt something
11:55:44 24 down, correct?

11:55:44 25 A. That is correct.

Henderson - direct

11:55:46 1 Q. Let's talk about Domino Foods pricing for a minute,
11:55:51 2 Mr. Henderson. Would you please turn to tab PTX 041.

11:56:05 3 A. 041, yes.

11:56:06 4 Q. Now, Mr. Henderson this document that's marked
11:56:09 5 confidential by ASR so don't tell me any details of the
11:56:13 6 statements made in these e-mails. Is that okay?

11:56:16 7 A. Yes, sir.

11:56:17 8 Q. Is this an e-mail chain that you sent or received in
11:56:21 9 July 2020?

11:56:21 10 A. Yes.

11:56:23 11 Q. And this document relates to potential bids for a
11:56:26 12 prospective customer, correct?

11:56:28 13 A. That is correct.

11:56:29 14 MR. GEIGER: Your Honor, I move for admission of
11:56:31 15 PTX 041.

11:56:32 16 MR. YATES: No objection.

11:56:33 17 THE COURT: Okay.

11:56:34 18 (PTX Exhibit No. 041 was admitted into
11:56:35 19 evidence.)

11:56:36 20 BY MR. GEIGER:

11:56:37 21 Q. Please turn to tab PTX 053. Before I do that.

11:56:40 22 MR. GEIGER: Your Honor, I believe I moved PTX
11:56:50 23 055 into evidence, but I just want to confirm that I made
11:56:53 24 that request.

11:56:54 25 THE COURT: Say that again.

Henderson - direct

11:56:55 1 MR. GEIGER: I believe I moved to admit PTX 055
11:56:58 2 into evidence earlier, but I want to confirm that request.

11:57:01 3 THE COURT: I don't know if you did or not, but
11:57:03 4 assuming you didn't.

11:57:04 5 MR. YATES: There is no objection.

11:57:05 6 THE COURT: So if it's not in, it's in, if it
11:57:10 7 wasn't already.

11:57:11 8 MR. GEIGER: Thank you, Your Honor. I
11:57:12 9 appreciate that.

11:57:13 10 BY MR. GEIGER:

11:57:14 11 Q. Let's go to tab PTX 053, Mr. Henderson. This is an
11:57:18 12 e-mail chain you sent and received in August 2020, is that
11:57:21 13 correct?

11:57:22 14 A. Yes, sir.

11:57:23 15 MR. GEIGER: Your Honor, I move for admission of
11:57:25 16 PTX 053.

11:57:27 17 MR. YATES: No objection to this one either,
11:57:29 18 Your Honor.

11:57:29 19 THE COURT: All right. Thank you.

11:57:30 20 (PTX Exhibit No. 053 was admitted into
11:57:32 21 evidence.)

11:57:31 22 BY MR. GEIGER:

11:57:32 23 Q. Now, Mr. Henderson at the bottom of the first page is
11:57:34 24 an e-mail from Mr. Whittaker to you. Do you see that?

11:57:35 25 A. Yes, sir.

Henderson - direct

11:57:39 1 Q. And Mr. Whittaker is a director of national accounts?

11:57:43 2 A. He is.

11:57:45 3 Q. And the third line of this e-mail he wrote to you,

11:57:49 4 Imperial is sold out through December 20. Correct?

11:57:53 5 A. Yes, that's what I have.

11:57:55 6 Q. Now, going out to the middle of the page, you

11:58:00 7 responded to Mr. Whittaker's e-mail, correct?

11:58:03 8 A. I did.

11:58:03 9 Q. And you expressed your belief at the beginning that

11:58:06 10 this was good competitive intelligence, correct?

11:58:10 11 A. Yes.

11:58:11 12 Q. And the second paragraph you then wrote, "Imperial

11:58:15 13 being sold out gives us justification for a premium in

11:58:19 14 October/December versus calendar year 2021 business."

11:58:24 15 Correct?

11:58:25 16 A. I wrote that to Adam, yes.

11:58:26 17 Q. Mr. Henderson, you received good competitive

11:58:30 18 intelligence on Imperial, a competitor being sold out of

11:58:33 19 refined sugar and that gave you justification for a premium,

11:58:37 20 correct?

11:58:37 21 A. Well, I probably had some of that information already

11:58:40 22 and that information is also put in the Milling and Baking,

11:58:42 23 it's disclosed weekly, we had an idea that may be the case.

11:58:44 24 The premium is really every customer is unique, so there is

11:58:52 25 always somebody there that fills the void, another supplier,

Henderson - cross

11:58:57 1 somebody else coming in, so when you think you may get a
11:59:01 2 premium you probably won't.

11:59:03 3 Q. Mr. Henderson, you received what you called good
11:59:05 4 competitive intelligence, correct?

11:59:07 5 A. Yes.

11:59:07 6 Q. And then you wrote, "Imperial being sold out gives us
11:59:12 7 justification for a premium." Correct?

11:59:14 8 A. Yes.

11:59:14 9 Q. And premium means a higher price, doesn't it?

11:59:17 10 A. In most cases it could be, and that's just
11:59:21 11 information we're gathering from many sources, whether that
11:59:25 12 was accurate or not, I couldn't tell you.

11:59:28 13 MR. GEIGER: I have no further questions at this
11:59:29 14 time, Your Honor.

11:59:30 15 THE COURT: All right. Thank you.

11:59:31 16 Cross-exam.

11:59:35 17 MR. YATES: Thank you, Your Honor.

11:59:38 18 CROSS-EXAMINATION

11:59:38 19 BY MR. YATES:

11:59:39 20 Q. Good morning, barely, Mr. Henderson. How are you?

11:59:40 21 A. Very good. Thank you.

11:59:41 22 Q. All right. Mr. Henderson, let's try to clear a
11:59:43 23 couple of things up for the Court. First of all, there are
11:59:50 24 a lot of questions about number 16. What is that, sir?

11:59:52 25 A. The 16 is the commodity trading position for United

Henderson - cross

12:00:02 1 States sugar, raw sugar.

12:00:03 2 Q. So as I understand it, the number 16 is a published
12:00:08 3 market index; is that right?

12:00:10 4 A. Yes, it is.

12:00:11 5 Q. Okay. And people can buy and sell futures in that
12:00:15 6 commodity index, correct?

12:00:17 7 A. Yes, they do that every day.

12:00:18 8 Q. And that's something that is important to ASR's
12:00:24 9 business, is that right?

12:00:25 10 A. Yes.

12:00:25 11 Q. Why?

12:00:26 12 A. Because we're a cane refiner, so all our purchases
12:00:31 13 start with the 16 market.

12:00:31 14 Q. That's because the 16 market is the price for raw
12:00:37 15 sugar if you're buying and selling raw sugar, correct?

12:00:40 16 A. That is correct.

12:00:41 17 Q. And raw sugar is a major component part of the
12:00:45 18 ultimate cost of refined sugar for ASR, correct?

12:00:49 19 A. Yes, it is.

12:00:50 20 Q. And ASR needs to purchase raw sugar in order to make
12:00:52 21 refined sugar because it doesn't have enough sugar fields;
12:01:00 22 correct?

12:01:00 23 A. Yeah, all our purchases are based off of 16 in
12:01:00 24 industrial.

12:01:00 25 Q. ASR buys imported sugar; is that right?

Henderson - cross

12:01:11 1 A. Yes.

12:01:11 2 Q. And that's imported raw sugar, correct?

12:01:13 3 A. Correct.

12:01:14 4 Q. Is there also something called a number 11 price?

12:01:17 5 A. Yes, there is.

12:01:18 6 Q. What is that?

12:01:19 7 A. That is the -- that's the world market for raw sugar.

12:01:24 8 So that's traded throughout the globe.

12:01:28 9 Q. And take a quick look at what is -- what was marked

12:01:31 10 by the government and admitted as PTX 048, if you would.

12:01:41 11 A. 048. Got it.

12:01:51 12 Q. You see in the e-mail in the middle of the page that

12:01:51 13 says buyers telling Ron they're looking for 34.50. It's

12:02:04 14 highlighted on the screen if you want to see it?

12:02:04 15 A. Yes, I got it. Thank you.

12:02:08 16 Q. Is it your understanding that Mr. Wistisen speaks

12:02:11 17 with buyers of refined sugar in addition to suppliers?

12:02:17 18 A. Yes, I believe he speaks to many different actors in

12:02:20 19 the industry.

12:02:21 20 Q. Let's take a quick look at one of Mr. Wistisen's

12:02:27 21 reports. The government has asked you a lot of questions

12:02:32 22 about e-mails, but please take a look at PTX 042 in the

12:02:32 23 government's binder.

12:02:42 24 A. Yes, I have it.

12:02:42 25 Q. Is PT -- does PTX 042 have Mr. Wistisen's domestic

Henderson - cross

12:02:52 1 sugar report for June 21st of 2021?

12:02:55 2 A. Yes, it does.

12:02:57 3 MR. YATES: Your Honor, I move PTX 042 into
12:03:01 4 evidence.

12:03:02 5 MR. GEIGER: No objection.

12:03:02 6 THE COURT: All right. Thank you. It's
12:03:04 7 admitted.

12:03:05 8 (PTX Exhibit No. 042 was admitted into
12:03:05 9 evidence.)

12:03:05 10 BY MR. YATES:

12:03:06 11 Q. Do you see that Mr. Wistisen's report has, if you go
12:03:06 12 to I believe it's the fourth page with the Bates number
12:03:12 13 ending in 585, it's got a section on US Sugar production,
12:03:17 14 correct?

12:03:18 15 A. Yes, sir.

12:03:19 16 Q. And does the United States Department of Agriculture
12:03:21 17 also publish information on US Sugar production?

12:03:21 18 A. Yes, they do.

12:03:21 19 Q. Does the United States Department of Agriculture also
12:03:22 20 publish information in a report called the WASDE on supply
12:03:32 21 and demand?

12:03:32 22 A. Yes, they do.

12:03:42 23 Q. If you go two pages further in Mr. Wistisen's report,
12:03:42 24 do you see he has a section on Mexico's supply and demand?

12:03:50 25 A. Yes.

Henderson - cross

12:03:50 1 Q. If you go to the next pages he's got a page on US
12:03:55 2 Sugar imports, correct?

12:03:55 3 A. Correct.

12:03:56 4 Q. And then he's got some data on the following page and
12:04:00 5 some charts over time, correct?

12:04:01 6 A. Yes.

12:04:02 7 Q. And then on the same page, a page ending 590 of this
12:04:08 8 exhibit, he's got information on US Sugar deliveries,
12:04:12 9 correct?

12:04:12 10 A. Yes, he does.

12:04:14 11 Q. And then if you go to page 593, you see there is
12:04:19 12 information on sugar prices?

12:04:24 13 A. Yes, sir.

12:04:25 14 Q. If you go to the following page, you see that there
12:04:29 15 appear to be the number 16 and the number 11 raw prices over
12:04:35 16 time?

12:04:35 17 A. Correct.

12:04:42 18 Q. Please take a quick look at what was marked as PTX
12:04:50 19 053, sir. And Mr. Geiger read you the portion on good
12:04:52 20 competitive intelligence. And then immediately following
12:05:00 21 this, you wrote Cargill moving up to \$37.75 cent is
12:05:11 22 suspicious and that the Court can see there are two
12:05:14 23 customers, large industrial customers mentioned. Those
12:05:17 24 customers had noted Cargill being lower. Do you see that?

12:05:22 25 A. Yes, sir.

Henderson - cross

12:05:22 1 Q. In your experience, is it common for industrial
12:05:26 2 customers to provide you with information on competitor
12:05:32 3 pricing?
12:05:33 4 A. I would say almost happens on a daily basis.
12:05:40 5 Q. There were some questions about prices in the future.
12:05:47 6 Do you recall that?
12:05:47 7 A. Yes, sir.
12:05:48 8 Q. And are those price estimates based upon the number
12:05:53 9 16 market and the price futures from the number 16 market?
12:05:58 10 A. They are, so we reference those trading periods.
12:06:02 11 Q. The number 16 price, how often can that change?
12:06:06 12 A. By minute, I get updates every thirty minutes.
12:06:10 13 Q. And you get updates every thirty minutes because the
12:06:13 14 number 16 raw price is important to ASR's business, correct?
12:06:23 15 A. Very important.
12:06:24 16 Q. Mr. Henderson, let's switch gears and just talk very
12:06:31 17 briefly about a different topic. You're in the industrial
12:06:36 18 sales channel at ASR; correct?
12:06:39 19 A. Yes, I am.
12:06:40 20 Q. Does Domino have other sales channels?
12:06:42 21 A. We do.
12:06:43 22 Q. What are they?
12:06:44 23 A. We have a grocery sales channel, we have a food
12:06:47 24 service sales channel, we have a specialty sales channel and
12:06:51 25 we have an export sales channel.

Henderson - cross

12:06:53 1 Q. What percentage of Domino's refined sugar sales are
12:06:57 2 made to customers in the industrial sales channel?

12:07:01 3 A. Industrial is approximately fifty percent.

12:07:04 4 Q. So the other fifty percent of Domino's sales are to
12:07:08 5 customers in different channels such as food service and
12:07:12 6 grocery, is that right?

12:07:13 7 A. That is correct.

12:07:14 8 Q. And within industrial, do sales to distributors such
12:07:19 9 as Indiana Sugar count as industrial sales?

12:07:21 10 A. Yes, they do.

12:07:23 11 Q. And what percentage of industrial sales are sales to
12:07:27 12 distributors?

12:07:28 13 A. It could make up as much as 15 to 25 percent
12:07:31 14 depending on the year.

12:07:34 15 Q. Now, go -- let's go back and talk about the number 16
12:07:40 16 price for just a moment. Do some large customers enter into
12:07:41 17 contacts with ASR based on the number 16 price?

12:07:41 18 A. Yes, they do.

12:07:50 19 Q. Are those called toll or FOB contracts?

12:07:52 20 A. We have two sets of contracts like that's toll
12:07:54 21 contracts where the customer executes the 16 and EO
12:08:00 22 contracts.

12:08:00 23 Q. Would you explain to the Court how a contract with a
12:08:02 24 large industrial customer that's a toll or EO contract
12:08:10 25 works?

Henderson - cross

12:08:13 1 A. These are large industrial customers that we have
12:08:16 2 dealt with historically for many, many years, they have
12:08:19 3 commodity departments usually in their companies where they
12:08:24 4 can monitor not only sugar but all sorts of ingredients,
12:08:28 5 they say to us just please provide a margin or a toll rate
12:08:32 6 and we'll execute our futures when the time comes. A couple
12:08:37 7 of them get toll rate on the invoice, there is no pricing,
12:08:43 8 and others execute a price in the future when they feel the
12:08:46 9 time is right.

12:08:47 10 Q. Let's see if we can break that down and make sure I
12:08:50 11 understand it, at least. As I understand it, these large
12:08:53 12 industrial customers have commodity departments that track
12:08:57 13 the number 16 price; is that right?

12:08:58 14 A. Correct.

12:08:59 15 Q. As I understand it, the contract that ASR would enter
12:09:04 16 into with one of these large industrial customers would
12:09:07 17 provide ASR with their refining margin, is that right?

12:09:12 18 A. Yes, sir.

12:09:13 19 Q. And that refining margin that's negotiated between
12:09:16 20 ASR and the large industrial customer, correct?

12:09:18 21 A. Correct.

12:09:19 22 Q. Okay. And then the customer can choose at which
12:09:23 23 point they want to cover the number 16 raw sugar contract.
12:09:26 24 Correct?

12:09:28 25 A. Correct.

Henderson - cross

12:09:30 1 Q. So the customer can choose the price at which it
12:09:35 2 wants to cover the number 16 raw sugar contract; is that
12:09:39 3 right?

12:09:39 4 A. Correct.

12:09:40 5 Q. Okay. And so the customer in essence has control
12:09:43 6 over the price of the largest input costs into refined
12:09:49 7 sugar, correct?

12:09:49 8 A. That is correct.

12:10:05 9 Q. Would you please take a look at DTX 066 in your
12:10:09 10 binder. It's in the defendants' binder, not in the binder
12:10:14 11 provided by the Department of Justice. And this document
12:10:24 12 has been marked as confidential so we won't display it on
12:10:27 13 the big screen, but you and the Judge can follow along.
12:10:32 14 Okay?

12:10:32 15 A. 066, correct?

12:10:34 16 Q. Yes. Do you have that in front of you, sir. DTX
12:10:39 17 066.

12:10:39 18 A. Yes.

12:10:41 19 Q. Marked as Exhibit 23 to your deposition?

12:10:42 20 A. Correct.

12:10:45 21 Q. Okay. DTX 066 is an e-mail from Adam Whittaker to
12:10:51 22 you on May 4th of last year, 2021; correct?

12:10:52 23 A. Yes, sir.

12:10:52 24 Q. And Mr. Whittaker reports to you in the industrial
12:10:52 25 sales channel of ASR; correct?

Henderson - cross

12:11:01 1 A. He does.

12:11:03 2 Q. And the title of the e-mail is strategic
12:11:08 3 opportunities fiscal year 2022, correct?

12:11:11 4 A. Correct.

12:11:13 5 MR. YATES: Your Honor, I move DTX 066 into
12:11:15 6 evidence.

12:11:15 7 MR. GEIGER: No objection.

12:11:16 8 THE COURT: All right. Thank you. It's
12:11:19 9 admitted.

12:11:21 10 (DTX Exhibit No. 066 was admitted into
12:11:22 11 evidence.)

12:11:22 12 BY MR. YATES:

12:11:23 13 Q. Let's take a look at the attachment to this exhibit,
12:11:24 14 sir. Do you see it's a printout of a spreadsheet?

12:11:28 15 A. Yes, sir.

12:11:29 16 Q. Okay. And does this spreadsheet reflect incremental
12:11:31 17 sales opportunities to industrial customers that
12:11:41 18 Mr. Whittaker had identified for you?

12:11:41 19 A. Yes, it does.

12:11:45 20 Q. And that's for fiscal year 2022, correct?

12:11:50 21 A. That is correct.

12:11:51 22 Q. Okay. And just so the Court can follow along, column
12:11:52 23 B, does that list the potential incremental sales
12:12:00 24 opportunities at industrial customers?

12:12:00 25 A. Column B does that.

Henderson - cross

12:12:07 1 Q. When we're talking about incremental sales
12:12:10 2 opportunities, these are sales opportunities above and
12:12:13 3 beyond what ASR may have already contracted, correct?

12:12:16 4 A. That's correct.

12:12:17 5 Q. Okay. So column B has the customer, and column C,
12:12:22 6 does that have the shipped to location for the customer,
12:12:26 7 sir?

12:12:26 8 A. Yes, that's for the customer.

12:12:28 9 Q. And column G, does that have the -- does that contain
12:12:35 10 who ASR believes the competition is for a particular sale?

12:12:38 11 A. Yes.

12:12:40 12 Q. And column N all the way over on the third page, sir,
12:12:46 13 just in the way that Excel's print out, do you see that's a
12:12:51 14 notes column?

12:12:51 15 A. I do.

12:12:52 16 Q. I'm sorry, column R. Do you see that?

12:12:55 17 A. Column R, yes.

12:12:58 18 Q. The notes column also sometimes has information on
12:13:02 19 who ASR believed it's competing with for that particular
12:13:06 20 incremental opportunity, correct?

12:13:08 21 A. Yes.

12:13:08 22 Q. And just so the Court can follow along, let's take a
12:13:13 23 look at an example. If you look at I believe it's row --
12:13:20 24 let's take a look at Row 34, sir?

12:13:24 25 MR. GEIGER: Your Honor, I object to this line

Henderson - cross

of questioning as beyond the scope of direct examination.

THE COURT: All right.

MR. YATES: Your Honor, I think it's fairly within the scope of the direct.

THE COURT: You got to repeat the question for me.

MR. YATES: Sure. My question is relatively simple. I just wanted to illustrate what the spreadsheet is for Your Honor so Your Honor can see and understand a document that's already been admitted into evidence.

THE COURT: The document has already been admitted into evidence. I'm going to overrule the objection.

BY MR. YATES:

Q. So 34, sir, column 34 -- Row 34?

A. Row 34.

Q. Do you see there is a customer listed in Georgia?

A. Yes, sir.

Q. And then the competitors in column G are Cargill, NSM, that's the sugar marketing cooperative from up in the Red River Valley, sir?

A. That's National Sugar Marketing.

Q. And then United and Imperial, correct?

A. Yes.

Q. And if we were to look at the other potential

Henderson - redirect

12:14:35 1 incremental opportunities it lists who ASR at least at the
12:14:40 2 time believed it was competing against, correct?

12:14:43 3 A. Correct.

12:14:44 4 MR. YATES: No further questions, Your Honor.
12:14:46 5 Thank you.

12:14:47 6 THE COURT: Thank you.

12:14:47 7 Redirect.

12:14:49 8 MR. GEIGER: Yes, Your Honor.

12:14:49 9 May I proceed?

12:14:52 10 THE COURT: Yes. Please.

12:14:52 11 REDIRECT EXAMINATION

12:14:53 12 BY MR. GEIGER:

12:15:00 13 Q. Mr. Henderson, just a couple of questions.

12:15:02 14 To your knowledge USDA does not provide supply
12:15:07 15 information for specific processors, does it?

12:15:11 16 A. I'm not sure, in their sweetener report they have
12:15:16 17 crop conditions by regions, I believe, so I don't know how
12:15:19 18 they identify it.

12:15:20 19 Q. Those are regions and not specific processors,
12:15:23 20 correct?

12:15:24 21 A. Yes.

12:15:29 22 Q. To your knowledge, USDA does not provide prices for
12:15:34 23 its specific processors, does it?

12:15:36 24 A. No, they put a monthly table out on pricing.

12:15:40 25 Q. And those pricing figures are aggregated?

Wineinger - direct

12:15:43 1 A. Yes.

12:15:44 2 MR. GEIGER: No further questions Your Honor.

12:15:45 3 THE COURT: Thank you.

12:15:46 4 Thank you, sir. You are excused.

12:15:48 5 What's next?

12:15:49 6 MR. HANNA: Your Honor, at this time the United
12:15:52 7 States calls United's CEO Matthew Wineinger to the stand as
12:16:00 8 an adverse.

12:16:01 9 THE COURT: All right. Thank you.

12:16:15 10 COURT CLERK: Please raise your right hand.

12:16:19 11 Please state and spell your full name for the record.

12:17:01 12 THE WITNESS: Matthew David Wineinger,

12:17:12 13 M-A-T-T-H-E-W, D-A-V-I-D, W-I-N-E-I-N-G-E-R.

12:17:21 14 MATTHEW DAVID WINEINGER, having been duly sworn
12:17:25 15 was examined and testified as follows:

12:17:31 16 MR. HANNA: May I proceed, Your Honor?

12:17:34 17 THE COURT: Yes, please.

12:17:41 18 DIRECT EXAMINATION

12:17:41 19 BY MR. HANNA:

12:17:42 20 Q. Good afternoon, Mr. Wineinger. Good to see you. I
12:17:44 21 handed you a binder for the depositions and documents and
12:17:45 22 I'll refer to you and I'll let you know.

12:17:52 23 Mr. Wineinger, you're the president and CEO of
12:17:54 24 United Sugars?

12:17:55 25 A. I am.

Wineinger - direct

12:17:57 1 Q. You have been CEO of United for the past seven years?

12:18:01 2 A. That's correct.

12:18:01 3 Q. And you report to the United executive committee that

12:18:05 4 is comprised of the four CEOs of United owners, right?

12:18:10 5 A. That's correct.

12:18:10 6 Q. Now, as the United CEO, you're paid a base salary as

12:18:15 7 well as an incentive based bonus, is that correct?

12:18:18 8 A. That's correct.

12:18:19 9 Q. There are two components of your bonus, correct?

12:18:21 10 A. Yes.

12:18:21 11 Q. And part of your bonus is based on achieving or

12:18:25 12 exceeding the net selling price that is set by the executive

12:18:28 13 committee on a yearly basis, right?

12:18:31 14 A. Yes.

12:18:31 15 Q. The higher the net selling price that United can

12:18:34 16 achieve, that's better for your bonus, right?

12:18:36 17 A. That's correct.

12:18:37 18 Q. Now, the net selling price component of your bonus is

12:18:41 19 weighted at 75 percent, right?

12:18:43 20 A. Yes.

12:18:44 21 Q. So if United gets higher prices, that means the

12:18:48 22 bigger bonus for you, right?

12:18:48 23 A. Higher net selling prices.

12:18:52 24 Q. Higher net selling price means bigger bonus for you,

12:18:55 25 right?

Wineinger - direct

12:18:56 1 A. That's correct.

12:19:10 2 Q. Now, on a weekly basis, United tells the owners the
12:19:14 3 type of redefined sugar United wants their plant to either
12:19:18 4 load out or produce for United to sell, right?

12:19:22 5 A. We direct our plants in terms of what form of product
12:19:25 6 to produce, and so you're right in terms of what package
12:19:29 7 form, et cetera.

12:19:30 8 Q. Do you tell US Sugar how much 50-pound bags to
12:19:33 9 produce for that week?

12:19:35 10 A. That's correct.

12:19:36 11 Q. And you do that based on long-term and short-term
12:19:39 12 needs that United sees, right?

12:19:41 13 A. That's correct.

12:19:42 14 Q. And United member has no ability to override that
12:19:45 15 directive, right?

12:19:48 16 A. They try to achieve what we ask them to do, but they
12:19:51 17 will have breakdowns from time to time.

12:19:54 18 Q. But generally speaking, US Sugar couldn't say
12:19:57 19 Mr. Wineinger, I really like to make smaller retail products
12:20:00 20 this week, right?

12:20:02 21 A. Ask the question again.

12:20:05 22 Q. One of United members like US Sugar couldn't say I
12:20:08 23 prefer to make retail size packages because it makes more
12:20:11 24 money for me, right?

12:20:14 25 A. They have lines that they try to maximize every day

Wineinger - direct

12:20:19 1 and they run those lines every day of the week.

12:20:21 2 Q. But what United tells them how many 50-pound bags or
12:20:25 3 what to produce on a weekly basis, they can't override that
12:20:30 4 unless one of the systems is broken down, right?

12:20:32 5 A. They try to achieve what we put out in a plan, yes.

12:20:35 6 Q. If improvements are needed for any of the asset at
12:20:39 7 one of the United owner plants with respect to packaging or
12:20:43 8 transportation, anything outside bulk sugar production,
12:20:48 9 that's on a capital plan approved by United right?

12:20:51 10 A. United as well as the member who will be making the
12:20:54 11 investment.

12:20:55 12 Q. Could you please turn to PTX 330 in your notebook,
12:20:59 13 sir. PTX 330 is a United PowerPoint presentation prepared
12:21:12 14 for the purpose of a potential acquisition of Imperial,
12:21:16 15 right?

12:21:16 16 A. That's correct.

12:21:18 17 MR. HANNA: Your Honor, at this time the United
12:21:21 18 States moves to admit PTX 330 into evidence.

12:21:21 19 MR. BUTERMAN: No objection.

12:21:22 20 THE COURT: It's admitted.

12:21:22 21 (PTX Exhibit No. 330 was admitted into
12:21:24 22 evidence.)

12:21:24 23 BY MR. HANNA:

12:21:25 24 Q. Now, now Seine referenced in this document is a
12:21:32 25 reference to Imperial?

Wineinger - direct

12:21:32 1 A. That's right.

12:21:32 2 Q. This is dated February 2020, right?

12:21:36 3 A. Yes.

12:21:36 4 Q. At this point US Sugar was pursuing an acquisition of
12:21:40 5 Imperial, right?

12:21:40 6 A. Yes.

12:21:41 7 Q. A few months prior to this, United had stop pursuing
12:21:45 8 its own acquisition of Imperial, right?

12:21:47 9 A. That's right.

12:21:48 10 Q. This is a presentation United gave its owner, US
12:21:51 11 Sugar, on the sugar market in the U.S., right?

12:21:51 12 A. That's right.

12:21:51 13 Q. If you could turn to page 5. PTX 330. Do you see at
12:22:01 14 the top it says Supply Industry Structure Processors?

12:22:01 15 A. Yes.

12:22:01 16 Q. Now, the refining step in the supply chain on this
12:22:11 17 slide identifies the companies that were supplying sugar
12:22:14 18 from either sugar beets or raw sugarcane, right?

12:22:17 19 A. That's correct.

12:22:18 20 Q. All right. Now if we move to the left on this supply
12:22:21 21 chain slide, the marketers of the companies out in the
12:22:24 22 market selling the sugar, produced by the cane refiners or
12:22:28 23 the beet sugar processors, right?

12:22:30 24 A. That's a portion of the industry's marketers.

12:22:32 25 Q. Now, if we move to the left down the supply chain we

Wineinger - direct

12:22:38 1 get to the sugar buyers/channel, do you see that?

12:22:42 2 A. I do.

12:22:43 3 Q. Now the sugar buyer/channel step includes food
12:22:47 4 processors, retail and distributors, right?

12:22:50 5 A. Correct.

12:22:51 6 Q. Now, the food processors, retail and distributors are
12:22:54 7 the direct customers that marketers are like United used as
12:22:58 8 an outlet to sell sugar, right?

12:23:00 9 A. That's correct.

12:23:01 10 Q. If you could turn to the next page, sir, please. You
12:23:07 11 see all the way at the bottom of this, do you see it says
12:23:11 12 distributors are assigned a market share of zero percent of
12:23:14 13 the supply. Do you see that?

12:23:16 14 A. I do.

12:23:16 15 Q. That's what you have told US Sugar, right?

12:23:19 16 A. That's what the slide says.

12:23:21 17 Q. You can put that aside.

12:23:24 18 Now earlier you mentioned we talked a little bit
12:23:28 19 about, you mentioned United pursues its own acquisition of
12:23:32 20 Imperial, right?

12:23:32 21 A. That's correct.

12:23:34 22 Q. In late 2018 you learned that Louis Dreyfus, the
12:23:37 23 owner of Imperial, was looking at a possible joint venture,
12:23:40 24 right?

12:23:40 25 A. Roughly about that time, yes.

Wineinger - direct

- 12:23:42 1 Q. You learned in late 2018 that rumor?
- 12:23:45 2 A. Yes.
- 12:23:45 3 Q. And then you contacted Imperial's CEO Mike Gorrell if
- 12:23:51 4 they could consider a strategic buyer, correct?
- 12:23:53 5 A. That is correct.
- 12:23:54 6 Q. This was a potential acquisition of Imperial by
- 12:23:57 7 United itself, right?
- 12:23:58 8 A. At that point in time, that's correct.
- 12:24:00 9 Q. And so then in February of 2019, United signed a
- 12:24:04 10 nondisclosure agreement with Imperial for the purpose of a
- 12:24:06 11 potential acquisition of Imperial?
- 12:24:08 12 A. That's correct.
- 12:24:09 13 Q. And then in the summer of 2019, United made two
- 12:24:12 14 separate offers to acquire Imperial, right?
- 12:24:16 15 A. Yes.
- 12:24:16 16 Q. And both of those offers from United to acquire
- 12:24:19 17 Imperial were rejected by Louis Dreyfus, right?
- 12:24:23 18 A. Yes.
- 12:24:23 19 Q. Louis Dreyfus thought United's offer price was too
- 12:24:27 20 low, right?
- 12:24:28 21 A. That's correct.
- 12:24:29 22 Q. If you could please turn to PTX 490 in your notebook,
- 12:24:32 23 sir. PTX 490 is a presentation prepared for American
- 12:24:42 24 Crystal Strategic Planning Meeting in 2019, is that right?
- 12:24:52 25 A. It doesn't have the date on it, but I believe that's

Wineinger - direct

12:24:54 1 what it would have been.

12:24:58 2 MR. HANNA: Your Honor, United States moves to
12:25:01 3 admit PTX 490 at this time.

12:25:04 4 MR. BUTERMAN: No objection, Your Honor.

12:25:05 5 THE COURT: It's admitted.

12:25:06 6 (PTX Exhibit No. 490 was admitted into
12:25:07 7 evidence.)

12:25:07 8 BY MR. HANNA:

12:25:09 9 Q. Sir, I would like to -- if I could please turn to
12:25:12 10 page 4 of PTX 490 ending in the Bates number 1112. Do you
12:25:25 11 see this title of the slide is the Power of One, do you see
12:25:28 12 that?

12:25:28 13 A. I do.

12:25:29 14 Q. And I notice some notes at the bottom, do you see
12:25:33 15 those notes at the bottom of the statement. Do you see
12:25:37 16 those?

12:25:37 17 A. I do see those.

12:25:39 18 Q. So do you see where it says, "By pooling your sugar
12:25:43 19 with the sugar produced by three other sugar processors, we
12:25:46 20 have a much larger presence in the market."

12:25:50 21 Do you see that?

12:25:50 22 A. I do.

12:25:52 23 Q. And that's what the United document says, right?

12:25:55 24 A. That's what the notes say, yes.

12:25:57 25 Q. So by combining this volume to sell, that creates

Wineinger - direct

12:26:00 1 this larger presence for United, right?

12:26:03 2 A. That's correct.

12:26:04 3 Q. Combining the production from the four United owners
12:26:08 4 makes this larger presence in the market?

12:26:11 5 A. That's correct.

12:26:11 6 Q. And then United calls this the Power of One, right?

12:26:15 7 A. That's what this slide is communicating, yes.

12:26:18 8 Q. So United owners are competing as one large presence
12:26:22 9 in the market, right?

12:26:24 10 A. We market and distribute together, yes.

12:26:26 11 Q. Competing in the market as one?

12:26:29 12 A. Yes.

12:26:31 13 Q. If we could turn to the next page, page 5 ending in
12:26:35 14 Bates number 1113. Are you there?

12:26:38 15 A. Yes.

12:26:39 16 Q. On the screen here, this is a huge map that shows the
12:26:43 17 intensity of delivery of sugar by United to the customer
12:26:46 18 locations on this map, right?

12:26:47 19 A. That's correct.

12:26:49 20 Q. And the fiery red color means higher volumes of sales
12:26:52 21 by United delivered to these customers in those locations?

12:26:54 22 A. Higher volume in those regions, yes.

12:26:56 23 Q. Now, there is a question in the box on the bottom
12:27:00 24 left-hand side that says, question is why sell here, and

12:27:02 25 then the answer is, most attractive opportunities given our

Wineinger - direct

12:27:09 1 supply and distribution costs relative to competition.

12:27:15 2 That's what it says?

12:27:16 3 A. It is.

12:27:17 4 Q. When it says our, that's referring to United, right?

12:27:20 5 A. That's correct.

12:27:22 6 Q. You can put that document aside.

12:27:24 7 Please turn to PTX 348 in your notebook.

12:27:31 8 MR. HANNA: Your Honor, I believe PTX 348 has
12:27:33 9 already been admitted into evidence.

12:27:35 10 THE COURT: Okay.

12:27:40 11 MR. HANNA: I ask that we can publish it.

12:27:41 12 THE COURT: Sure.

12:27:42 13 MR. HANNA: Thank you, Your Honor.

12:27:43 14 BY MR. HANNA:

12:27:44 15 Q. Mr. Wineinger, PTX 348 is a summary of possible
12:27:50 16 synergies that United believed would be realized from
12:27:55 17 United's acquisition of Imperial?

12:27:57 18 A. Possibly, yes.

12:27:59 19 Q. And this is dated June 10, 2019?

12:28:02 20 A. That's correct.

12:28:02 21 Q. This is a presentation that was shared with United's
12:28:05 22 executive committee, right?

12:28:06 23 A. I believe that to be correct.

12:28:08 24 Q. And that would include the CEO. US Sugar, Bob Buker?

12:28:13 25 A. That's correct.

Wineinger - direct

12:28:13 1 Q. As of June 10th, 2019, United was still considering a
12:28:17 2 possible acquisition of Imperial, right?

12:28:19 3 A. Yes.

12:28:20 4 Q. I think you had recently made at least one of the
12:28:23 5 offers to acquire, right?

12:28:24 6 A. I think that's right.

12:28:26 7 Q. Now, can you please turn to page 31 of the
12:28:29 8 presentation. Do you see page 31 that says product mix
12:28:43 9 upgrade and there is a map with blue dots?

12:28:45 10 A. I do.

12:28:46 11 Q. The first bullet point here says 2.5 million
12:28:50 12 hundredweight targeted for Clewiston 50-pound bag expansion.
12:28:55 13 Do you see that?

12:28:55 14 A. I see that.

12:28:56 15 Q. And that was -- well, so the 2.5 million
12:29:01 16 hundredweight referenced here on the slide is what a new
12:29:04 17 high speed 50-pound bag packaging line is capable of
12:29:08 18 producing, right?

12:29:09 19 A. That's my understanding.

12:29:10 20 Q. And then there is a map of the United States with
12:29:13 21 some blue dots. Do you see that?

12:29:15 22 A. I do.

12:29:16 23 Q. Well, I should say part of the United States,
12:29:18 24 correct?

12:29:19 25 A. Correct.

Wineinger - direct

- 12:29:20 1 Q. Now this map shows United's game plan for targeting
- 12:29:24 2 the expanding sales of 50-pound bags, right?
- 12:29:27 3 A. I believe this is actually where 50-pound bags exist.
- 12:29:31 4 Q. Opportunities for United, right?
- 12:29:33 5 A. For any competitor.
- 12:29:34 6 Q. But this is your slide, right?
- 12:29:36 7 A. It is.
- 12:29:37 8 Q. And the slide, the bullet point says 2.5 million
- 12:29:44 9 hundredweight targeted for Clewiston 50-pound bag expansion?
- 12:29:47 10 A. That's what the slide says.
- 12:29:49 11 Q. Clewiston is a refinery owned by US Sugar, right?
- 12:29:52 12 A. That's right.
- 12:29:53 13 Q. And US Sugar is United's owner, right?
- 12:30:02 14 A. Yes.
- 12:30:03 15 Q. The blue dots in this map indicate the locations that
- 12:30:07 16 United would likely target first for the increased 50-pound
- 12:30:12 17 bag sales if Clewiston expanded its 50-pound bag packaging
- 12:30:17 18 capacity, right?
- 12:30:18 19 A. These are opportunities we would take a look at.
- 12:30:21 20 Q. These are opportunities you would first target if you
- 12:30:23 21 expanded, right?
- 12:30:25 22 A. I'm not sure if they were meant to be first targets,
- 12:30:28 23 I don't know how many pounds that represents, but yes,
- 12:30:31 24 they're targets.
- 12:30:34 25 Q. Now, if we could, Mr. Snow, zoom out again. Sorry.

Wineinger - direct

12:30:41 1 Mr. Wineinger, at the top of the slide this says
12:30:44 2 3,000,000 one-time capital avoidance or delay, do you see
12:30:48 3 that?

12:30:48 4 A. I do.

12:30:48 5 Q. So the Imperial acquisition would enable United or
12:30:53 6 forgo altogether or delay this expansion at Clewiston for
12:30:56 7 the 50-pound bag?

12:31:01 8 A. That was our assumption.

12:31:03 9 Q. You can set that document aside.

12:31:06 10 United and its member owners benefit when its
12:31:09 11 competitors don't lower their prices, right?

12:31:11 12 A. That's correct.

12:31:14 13 Q. And United sends messages to competitors when United
12:31:17 14 doesn't want prices to go lower, right?

12:31:19 15 A. We do not.

12:31:21 16 Q. Please turn to PTX 450 in your notebook?

12:31:24 17 A. Four what?

12:31:27 18 Q. 450, sir. PTX 450 is a periodic report that you sent
12:31:30 19 to the United executives, is that right?

12:31:33 20 A. That's right.

12:31:36 21 Q. You put the content together for these reports,
12:31:39 22 right?

12:31:42 23 A. I do.

12:31:45 24 MR. HANNA: Your Honor, at this time the United
12:31:48 25 States moves to admit PTX 450 into evidence.

Wineinger - direct

12:31:51 1 MR. BUTERMAN: No objection.

12:31:52 2 THE COURT: Thank you. It's admitted.

12:31:53 3 (PTX Exhibit No. 450 was admitted into
12:31:55 4 evidence.)

12:31:55 5 BY MR. HANNA:

12:31:55 6 Q. Now you testified about this earlier, but United
12:31:57 7 executive committee that is included on this e-mail are the
12:32:00 8 four CEOs of United owners, right?

12:32:03 9 A. That's correct.

12:32:03 10 Q. I want to focus on your report to them on the sales
12:32:07 11 the very bottom first page, do you see that?

12:32:08 12 A. I do.

12:32:09 13 Q. You see the first sentence you write, that at this
12:32:14 14 point in time United is trying to push prices higher, right?

12:32:17 15 A. That's right.

12:32:18 16 Q. And you say United put in an expiration date on the
12:32:21 17 offers, that United had out in front of customers, right?

12:32:24 18 A. That's correct.

12:32:27 19 Q. So by putting an expiration date on the offers, you
12:32:30 20 write that United was as you quote here, sending a message
12:32:32 21 to NSM and other competitors that we are not interested in
12:32:34 22 allowing the market to slip lower, right?

12:32:37 23 A. We were actually trying to book some business by
12:32:40 24 putting that close out sale on.

12:32:42 25 Q. So it allows you to spur some business, but it also

Wineinger - direct

12:32:49 1 allowed United to send a message to NSM and other
12:32:52 2 competitors that you were not interested in the prices in
12:32:55 3 the market to go lower, right?

12:32:56 4 A. I don't know if it did that or not, but that is what
12:32:59 5 I wrote.

12:32:59 6 Q. That was your intended message to competitors, right?

12:33:03 7 A. I don't have an intended message to competitors. I
12:33:08 8 was communicating to customers that we were giving them an
12:33:10 9 opportunity to buy before we raise prices.

12:33:12 10 Q. The message United was sending to its competitors,
12:33:15 11 was United was not interested in prices going lower, right?

12:33:18 12 A. I don't send competitors a message.

12:33:21 13 Q. You wanted to avoid a price fight, right?

12:33:23 14 A. Once again, we negotiate deals with customers, not
12:33:28 15 with competitors.

12:33:29 16 Q. Now, sir, do you know if United has other ways to
12:33:32 17 send messages to competitors, other than what you described
12:33:35 18 in your e-mail?

12:33:37 19 A. No, I don't.

12:33:39 20 Q. You have been in the courtroom, the court
12:33:42 21 representing of United throughout the testimony?

12:33:45 22 A. For a portion of the proceedings, yes.

12:33:47 23 Q. And were you here today, sir?

12:33:50 24 A. I was not here today.

12:33:52 25 Q. You weren't listening to the testimony --

Wineinger - direct

12:33:53 1 A. I was listening on the feed or whatever you want to
12:33:55 2 call it, yes.

12:33:56 3 Q. So you heard the testimony of United's director of
12:34:04 4 strategic accounts, Eric Speece?

12:34:06 5 A. I did hear a portion of that.

12:34:08 6 Q. Did you hear a portion of Mr. Henderson's, who is at
12:34:11 7 Domino, did you hear his testimony?

12:34:13 8 A. I did not.

12:34:14 9 Q. Now, did you see the e-mail exchanges that were put
12:34:17 10 up on the screen in front of Mr. Speece, with respect to his
12:34:21 11 communications with Richard Wistisen?

12:34:24 12 A. I did not.

12:34:25 13 Q. You didn't see that?

12:34:25 14 A. The feed was too small upstairs, it's literally on an
12:34:30 15 iPad.

12:34:30 16 Q. The corporate representatives of Imperial was here,
12:34:34 17 wasn't he? Was he the courtroom?

12:34:36 18 A. The who?

12:34:37 19 Q. Mr. Gorrell was in the courtroom, did you see him in
12:34:41 20 the courtroom?

12:34:42 21 A. I did not.

12:34:43 22 Q. You were here in the courtroom yesterday, right?

12:34:45 23 A. I was.

12:34:45 24 Q. Now, Rich Wistisen, you're the person in charge of
12:34:50 25 approving payment for invoices that he sends to United for

Wineinger - direct

12:34:57 1

services, right?

12:34:59 2

A. That's right.

12:35:01 3

Q. Let me ask you this again. Did you hear any of

12:35:04 4

Mr. Speece's testimony today?

12:35:05 5

A. I did overhear some of his testimony, yes.

12:35:08 6

Q. And you didn't see any of the e-mail exchanges he had

12:35:11 7

with Mr. Wistisen?

12:35:12 8

A. I did not, they were too small on the screen.

12:35:14 9

Q. Are you aware that he communicated with Mr. Wistisen?

12:35:18 10

A. I was not, until these proceedings, over the last

12:35:21 11

couple of months.

12:35:21 12

Q. You were not aware until they, Department of Justice,

12:35:24 13

uncovered the e-mails, right?

12:35:25 14

A. I was not aware that they were having those

12:35:28 15

conversations.

12:35:28 16

Q. Did you hear Mr. Speece testify that there is no

12:35:31 17

company policy against calling competitors?

12:35:35 18

A. I did not hear him say that, no.

12:35:38 19

Q. Now, have you heard any of the testimony this week

12:35:42 20

about the concept or about sold position?

12:35:42 21

A. I understand what sold position is, yes.

12:35:50 22

Q. You know what sold position is, right?

12:35:52 23

A. Yes.

12:35:52 24

Q. It's your expectation that your people at United

12:35:52 25

would treat United's sold position as confidential, and that

Wineinger - cross

12:35:59 1 they would hold that information close to the vest; right?

12:36:02 2 A. There would be times when we would hold that
12:36:05 3 information close to the vest, yes.

12:36:06 4 MR. HANNA: No further questions, Your Honor.

12:36:08 5 THE COURT: Thank you.

12:36:09 6 Cross-exam.

12:36:17 7 MR. BUTERMAN: Your Honor, just for timing
12:36:18 8 purposes, because I know we're getting later, I think I'm
12:36:22 9 about fifteen, twenty minutes.

12:36:23 10 THE COURT: That's fine. I wanted to break at
12:36:24 11 1:00 because I have a call I have to take at 1:00.

12:36:30 12 MR. BUTERMAN: I will make sure we are done
12:36:32 13 well before that.

12:36:33 14 CROSS-EXAMINATION

12:36:33 15 BY MR. BUTERMAN:

12:36:34 16 Q. Good afternoon, Mr. Wineinger.

12:36:35 17 A. Good afternoon.

12:36:36 18 Q. I want to clear something up. Counsel asked you some
12:36:39 19 questions and I know he didn't mean to say this, but US
12:36:40 20 Sugar doesn't own United Sugars, correct?

12:36:42 21 A. Correct, there are four owner members of United
12:36:50 22 Sugars.

12:36:50 23 Q. Okay. And lets just look quickly at a couple of the
12:36:52 24 documents that counsel showed you. First, can we pull
12:37:00 25 Exhibit 490, the slide ending in 113.

Wineinger - cross

12:37:15 1 Mr. Wineinger, you are aware that the
12:37:19 2 government's proposed market definitions in this case are
12:37:23 3 the southeast market and the Georgia plus the surrounding
12:37:29 4 states market?

12:37:30 5 A. I am aware of that, yes.

12:37:32 6 Q. Counsel asked you some questions about the market.
12:37:34 7 Is this market consistent with either of those markets?

12:37:37 8 A. No.

12:37:38 9 Q. Can we look at PTX 348. Slide 31. Same question.

12:37:51 10 Mr. Wineinger, is this map consistent with either the
12:37:57 11 government's proposed southeast market or their proposed
12:38:00 12 Georgia plus the surrounding states market?

12:38:03 13 A. I believe those dots go well outside of that region.

12:38:06 14 Q. Counsel asked you some questions about net selling
12:38:10 15 price. Is net selling price the same thing as the delivered
12:38:13 16 price?

12:38:14 17 A. It is not.

12:38:16 18 Q. So prior to working for United, did you ever work
12:38:23 19 with any other agricultural products?

12:38:25 20 A. I have. I worked in the meat industry as well as
12:38:28 21 food ingredients.

12:38:29 22 Q. What's a cooperative?

12:38:32 23 A. A cooperative is a group that allows for a grower
12:38:35 24 producer of product, of agricultural products to market and
12:38:38 25 distribute their products together.

Wineinger - cross

12:38:41 1 Q. You testified about the four members of United.
12:38:46 2 Could a member leave United?
12:38:48 3 A. They could.
12:38:50 4 Q. Has a member ever left United?
12:38:52 5 A. There has been a member leave United.
12:38:54 6 Q. Who was that?
12:38:55 7 A. That would have been Southern Minnesota Beet Sugar
12:38:59 8 Cooperative.
12:38:59 9 Q. How much notice does a member have to give to leave?
12:39:03 10 A. One year.
12:39:04 11 Q. You mentioned Southern Minnesota Beet Cooperative,
12:39:07 12 that's also sometimes referred to as Southern Minn's?
12:39:13 13 A. That's correct.
12:39:14 14 Q. How is Southern Minn sugar sold?
12:39:17 15 A. National Sugar Marketing markets their sugar for
12:39:20 16 them.
12:39:21 17 Q. That's also the company that's referred to as NSM?
12:39:25 18 A. Yes.
12:39:26 19 Q. Do you compete with NSM?
12:39:28 20 A. We do.
12:39:29 21 Q. Do all four of United's members produce refined
12:39:32 22 sugar?
12:39:33 23 A. They do.
12:39:35 24 Q. Does United produce refined sugar?
12:39:37 25 A. We do not.

Wineinger - cross

12:39:38 1 Q. What role does United play with respect to its?

12:39:42 2 A. Can you ask the question.

12:39:44 3 Q. What role does United serve with respect to its
12:39:47 4 members' refined sugar?

12:39:48 5 A. Thank you.

12:39:48 6 We are charged with marketing, selling,
12:39:51 7 distributing and providing the logistics for all of our
12:39:54 8 members refining sugar.

12:39:55 9 Q. Does United tell members how much refined sugar to
12:39:59 10 produce?

12:39:59 11 A. We do not.

12:40:01 12 Q. Do United's members inform United about the overall
12:40:04 13 volume of sugar that each expects to produce in a given
12:40:07 14 year?

12:40:08 15 A. They do. Starting May 1st, they provide us
12:40:10 16 information as to what they think their crop that year is
12:40:15 17 going to produce.

12:40:16 18 Q. Why does each member do that?

12:40:17 19 A. It's important because it tells us roughly how much
12:40:20 20 volume we have to go sell into the marketplace.

12:40:22 21 Q. What is United Sugars's mission?

12:40:22 22 A. Our mission is to sell all of the sugar that our
12:40:30 23 members produce on an annual basis, and to sell it at the
12:40:32 24 highest net selling price.

12:40:34 25 Q. Why does United need to sell out its pool of sugar

Wineinger - cross

12:40:39 1 that your members produce each year?

12:40:42 2 A. Yeah, if we have to carry over sugar from one year to
12:40:45 3 the next, it's very expensive. We have to put it in one ton
12:40:50 4 tote boxes, cardboard boxes, and store them in a traditional
12:40:54 5 warehouse. And then we'll go and dump those the following
12:40:57 6 summer after we have completed the beet campaign, and then
12:41:00 7 still get that sugar shipped before the next crop starts to
12:41:03 8 come in. So that's about \$4 a hundredweight every time we
12:41:07 9 have to carry that product over.

12:41:09 10 Q. Has there ever been a time where United has not sold
12:41:13 11 all of its sugar in a given year?

12:41:15 12 A. Yeah. Unfortunately the first year that I was on the
12:41:19 13 job, I'll call it a rookie mistake, but I tried to wait out
12:41:23 14 the market to get a better price and we ended up not getting
12:41:27 15 \$4 a hundredweight sold that year. It cost us the \$4 a
12:41:31 16 hundredweight on four million hundredweight or \$16 million
12:41:35 17 that year plus we had to drop the price the following year,
12:41:39 18 not only on the 4 million but on the conditional new crop
12:41:43 19 that we sold into the marketplace. It was hugely expensive.
12:41:47 20 I was told by my bosses if I ever tried that again, I would
12:41:51 21 not be the CEO and president of United going forward.

12:41:53 22 Q. When would that have happened?

12:41:57 23 A. That would have happened my first year. The summer
12:42:01 24 of '15, is when we were trying to hold the market and we
12:42:05 25 carried that over into '16.

Wineinger - cross

12:42:02 1 Q. And aside from what you were told by the member
12:42:08 2 owners, what did that experience teach you?

12:42:10 3 A. It told me that we're not going to try to wait out
12:42:13 4 the market, we're going to be an aggressive seller, we have
12:42:17 5 been an aggressive seller into the marketplace ever since.

12:42:19 6 Q. As the CEO of United Sugars, what's your directive to
12:42:23 7 your sales team when they're faced with the choice of
12:42:26 8 holding out for a higher price or securing a long-term
12:42:30 9 contract at a lower price?

12:42:31 10 A. We'll take the long-term contract every time because
12:42:33 11 we can we cannot afford to hold the market.

12:42:37 12 Q. Now, where does United Sugars ship its sugar?

12:42:41 13 A. We ship sugar across the entire United States, in
12:42:47 14 fact over the last three years we have consistently shipped
12:42:50 15 to forty-five different states.

12:42:52 16 Q. How many states do United members have processing
12:42:57 17 facilities in?

12:42:57 18 A. Five.

12:42:58 19 Q. Which states are those?

12:43:00 20 A. We have several processing facilities in both
12:43:02 21 Minnesota and North Dakota, we have one Montana, we have one
12:43:07 22 in northern Wyoming and of course we have the U.S. Sugar
12:43:10 23 facility in Florida.

12:43:12 24 Q. How does United move, if United only has facilities
12:43:16 25 in five states, how does it sell to forty-five states?

Wineinger - cross

12:43:19 1 A. Sure. Sugar flows extremely easily in this country.
12:43:22 2 There are four main modes by which we ship sugar. One is in
12:43:26 3 a bulk railcar, one is in a bulk truck, we can also put
12:43:31 4 product in a package and ship it in a boxcar or we can ship
12:43:35 5 product in a van/truck, what you may know as a semi truck.
12:43:39 6 I guess we can also ship liquid sugar as well.

12:43:42 7 Q. You mentioned earlier that you had worked previously
12:43:45 8 in the meat industry. When you worked in that industry, did
12:43:47 9 you have to ship meat to customers?

12:43:49 10 A. We did on a daily basis.

12:43:51 11 Q. And how does the cost to ship meat compare to the
12:43:55 12 cost to ship sugar?

12:43:57 13 A. Sure. So in the meat industry, obviously it's a
12:44:00 14 perishable product, you got to keep it refrigerated and
12:44:05 15 getting it to the marketplace as quickly as possible is
12:44:08 16 important, so most of that is done via semi truck. Sugar is
12:44:12 17 much more easily shipped and more economically shipped
12:44:16 18 because we have modes to do that that are cheaper modes than
12:44:20 19 just semi trucks.

12:44:21 20 Q. Does United ship sugar into the geographic market
12:44:25 21 that the plaintiff defines as the southeast?

12:44:28 22 A. We do.

12:44:29 23 Q. Where does United ship that sugar from?

12:44:32 24 A. We can ship that sugar from any of our nine different
12:44:35 25 locations and we do.

Wineinger - cross

12:44:32 1 Q. Can you give me an example of -- and sorry, does that
12:44:37 2 include your facilities in the Red River Valley?

12:44:40 3 A. That does.

12:44:41 4 Q. And can you give me an example of the United
12:44:45 5 customers in Florida that would be getting sugar from the
12:44:48 6 Red River Valley?

12:44:49 7 A. Sure. Wal-Mart is a great example that we ship a
12:44:52 8 significant amount of sugar down to Florida for.

12:44:56 9 Q. Why does United ship sugar from Wyoming, Montana,
12:45:00 10 North Dakota and Minnesota, into what the government calls
12:45:04 11 the southeast?

12:45:05 12 A. Once again, we can ship sugar quite freely because
12:45:09 13 sugar does flow easily across, so we're always trying to
12:45:14 14 optimize all the opportunities that we have at the beginning
12:45:16 15 of any month, we look at what we project our sales to be
12:45:20 16 based on what product form that customer, or that set of
12:45:23 17 customers may need that month. We're always trying to
12:45:26 18 optimize that total freight picture.

12:45:28 19 Q. How does United get the sugar from Wyoming, Montana,
12:45:32 20 North Dakota, Minnesota down to what the government calls
12:45:36 21 the southeast?

12:45:38 22 A. Once again, it would be any of those four modes I
12:45:42 23 mentioned before, it would be bulk rail, bulk trucks,
12:45:46 24 boxcars or semi vans.

12:45:48 25 Q. Are you aware of something called the beet freeze?

Wineinger - cross

12:45:50 1 A. I am painfully aware of the beet freeze.

12:45:53 2 Q. When was the beet freeze?

12:45:54 3 A. So back in the fall of 2019 up in the Red River
12:45:58 4 Valley they were having a very wet fall that year and we
12:46:00 5 couldn't get the beets out of the ground. In fact, about
12:46:03 6 November 20th we had only harvested about 20 percent of the
12:46:07 7 beets, and Mother Nature then froze the rest of the beets,
12:46:11 8 the last twenty percent in the ground. We were never able
12:46:14 9 to harvest those. I should say our members were never able
12:46:18 10 to harvest those. Unfortunately, we had to declare force
12:46:21 11 majeure across our enterprises to the tune of about twenty
12:46:24 12 percent.

12:46:28 13 Q. Where in the country were the sugar beets affected by
12:46:31 14 the beet freeze?

12:46:34 15 A. In the Red River Valley.

12:46:37 16 Q. Did the refined sugar prices increase as a result of
12:46:40 17 the beet freeze?

12:46:43 18 A. They did across the country.

12:46:46 19 Q. Why did they increase across the country if the beet
12:46:49 20 freeze was in the upper midwest around North Dakota?

12:46:52 21 A. Because sugar flows and it's a national market.

12:46:55 22 Q. If the transaction between US Sugar and Imperial is
12:46:58 23 completed, what effect would that have on United's abilities
12:47:01 24 to serve customers in the event that something like the beet
12:47:04 25 freeze happens again?

Wineinger - cross

12:46:58 1 A. Sure. Because Imperial is a port refiner and uses
12:47:02 2 raws from Florida, or other places around the world, we
12:47:05 3 would have been able to ship those raws in and produce that
12:47:08 4 product at Imperial, and therefore decrease the amount of
12:47:12 5 force majeure we would have to serve on customers.

12:47:16 6 Q. Who does United compete with for the sale of refined
12:47:20 7 sugars?

12:47:20 8 A. American Sugar Refining, Indiana Sugar, Louisiana
12:47:24 9 Sugar, CSC, Sucro Can, National Sugar Marketing, Michigan,
12:47:30 10 Western.

12:47:30 11 Q. Are there others?

12:47:32 12 A. There is a whole bunch of distributors if you want me
12:47:35 13 to go on.

12:47:35 14 Q. No, that's okay. We get the point. If we were to
12:47:38 15 talk about who United competes with in the area that the
12:47:42 16 government has defined as the southeast, would the names of
12:47:45 17 United's competitors be any different?

12:47:48 18 A. They would not. The frequency by which we run up
12:47:52 19 against them may be different.

12:47:53 20 Q. I apologize. Because of the transcript in front of
12:47:57 21 me, did you mention Imperial in that list of competitors?

12:48:00 22 A. You know, I did not.

12:48:02 23 Q. Okay. Would you also include Imperial as one of your
12:48:04 24 competitors?

12:48:05 25 A. I would, but we don't run up against them that much

Wineinger - cross

12:48:09 1 because they are a residual seller for the most part in the
12:48:12 2 marketplace.

12:48:13 3 Q. Can you explain what a residual seller is?

12:48:15 4 A. Yeah, a residual seller is somebody who comes into
12:48:19 5 the marketplace later than we do, when we do run up against
12:48:23 6 them sometimes earlier, because we're an aggressive seller
12:48:26 7 and we don't have a buy/sell economic like they do, where
12:48:30 8 they have to pay for raws and then sell it, sell the
12:48:33 9 refined, they're much more of a residual seller.

12:48:34 10 Q. And do you consider residual sellers to be
12:48:40 11 particularly close competitors to United?

12:48:41 12 A. We do not.

12:48:44 13 Q. Which suppliers do you tend to see more often than
12:48:47 14 Imperial?

12:48:48 15 A. Yeah, the suppliers we see more often are those ones
12:48:51 16 again who are growing their own raw materials so, National
12:48:54 17 Sugar Marketing, Louisiana Sugar, Western, Michigan, ASR,
12:49:00 18 all of those grow a portion of their raw materials.

12:49:01 19 Q. If this transaction goes through and US Sugar owns
12:49:10 20 Imperial, is the Imperial facility going to remain a
12:49:20 21 residual seller?

12:49:21 22 A. No, it will not.

12:49:23 23 Q. Why not?

12:49:24 24 A. Because they're going to be part of our pool and
12:49:27 25 we're going to have to go out and aggressively sell their

Wineinger - cross

12:49:30 1 additional pile of sugar along with our big pile of sugar
12:49:33 2 and we're going to have to aggressively sell even a slightly
12:49:37 3 larger amount of sugar.

12:49:38 4 Q. What's your sense on how that's going to impact
12:49:41 5 things?

12:49:41 6 A. It's going to actually decrease prices.

12:49:45 7 Q. You're familiar with the Federal Sugar Program?

12:49:47 8 A. I am.

12:49:48 9 Q. Who oversees the Federal Sugar Program?

12:49:51 10 A. The United States Department of Agriculture.

12:49:52 11 Q. Does the United States Department of Agriculture take
12:49:55 12 action to affect the supply of sugar in the United States?

12:49:59 13 A. They can.

12:49:59 14 Q. What kind of actions can they take?

12:50:02 15 A. Normally what they're looking at is they're looking
12:50:04 16 at what the total needs of the US marketplace are and
12:50:08 17 they're assessing whether based upon domestic production
12:50:12 18 plus what has been imported under the TRQ and the Mexico
12:50:16 19 suspension agreements if there is enough sugar, and if there
12:50:19 20 isn't, they are more than willing to open those doors and
12:50:22 21 bring in more sugar.

12:50:25 22 Q. Do those actions have effects on prices in the United
12:50:28 23 States in your opinion?

12:50:29 24 A. They do.

12:50:30 25 Q. How so?

Wineinger - cross

12:50:31 1 A. Once again, any time you increase supply, obviously
12:50:35 2 that is going to decrease the price of sugar.

12:50:38 3 Q. Can you give us an example of a USDA action that has
12:50:43 4 affected the price of sugar?

12:50:45 5 A. Yeah. Last November, USDA took action to actually
12:50:50 6 increase the speed with which Mexico was allowed to import
12:50:54 7 product into the U.S.

12:50:56 8 Q. Do you believe that the USDA would take action if
12:51:00 9 United tried to raise its refined prices above competitive
12:51:03 10 levels after a transaction?

12:51:04 11 A. I very strongly believe they would do that.

12:51:07 12 Q. How does that affect you in your every day business?

12:51:11 13 A. Essentially we're not even going to try that, for
12:51:14 14 would we, it simply wouldn't make sense because we know that
12:51:17 15 USDA would take the action that would squelch any attempt we
12:51:21 16 would try.

12:51:23 17 Q. Are you familiar with the term Tier II sugar?

12:51:26 18 A. I am.

12:51:29 19 Q. What is Tier II sugar?

12:51:32 20 A. Tier II sugar is when you can actually bring sugar in
12:51:35 21 and pay the quota or the duty on that sugar. And so it
12:51:38 22 comes in at a higher price than non-tariff rate quota sugar
12:51:41 23 does which then essentially sets the ceiling of the U.S.
12:51:44 24 marketplace.

12:51:47 25 Q. Does Tier II sugar refer to raw or refined sugar?

Wineinger - cross

12:51:51 1 A. It's both and there is no limit on the amount of Tier
12:51:55 2 II sugar that can come into the country.

12:51:57 3 Q. Does the price of Tier II refined sugar affect the
12:52:01 4 prices that United is willing to accept for its sugar?

12:52:04 5 A. It does. We always know where Tier II sugar is
12:52:08 6 priced because it sets the ceiling for us.

12:52:09 7 Q. Could United Sugars exceed the price of Tier II
12:52:14 8 refined sugar?

12:52:14 9 A. We could try, but it would never work because
12:52:18 10 customers would bring in or distributors would bring in Tier
12:52:21 11 II sugar over the top and there would be excess supply of
12:52:24 12 sugar at that point in time.

12:52:25 13 Q. When you're evaluating whether to make a price offer
12:52:28 14 to a customer, do you consider the price of Tier II sugar?

12:52:31 15 A. We always know where it is.

12:52:33 16 Q. Why is that?

12:52:33 17 A. Once again, we don't try to go above the price of
12:52:37 18 Tier II sugar in pricing our product.

12:52:39 19 Q. Now, Mr. Wineinger, did United's estimate any
12:52:42 20 potential synergies from the Imperial transaction related to
12:52:45 21 United distribution network?

12:52:50 22 A. We did, we estimated roughly eight to \$12 million.

12:52:52 23 Q. And if this transaction does not -- well, what were
12:52:56 24 those distribution network savings, specifically?

12:52:59 25 A. So once again, we believe that we've got railcars,

Wineinger - cross

12:53:03 1 what I'll call passing in the night, maybe one going north
12:53:06 2 and one going south and we believe that we could get rid of
12:53:09 3 that and save roughly eight to \$12 million by being more
12:53:15 4 optimized on our freight economics.

12:53:17 5 Q. If this transaction does not close, will United be
12:53:20 6 able to achieve those distribution network savings?

12:53:23 7 A. No, because we don't have that additional
12:53:25 8 distribution point that would allow us to share back with
12:53:28 9 customers.

12:53:28 10 Q. Does United expect to achieve any synergies through
12:53:32 11 Imperial's packaging facility?

12:53:34 12 A. We do, we believe there are some opportunities there.

12:53:38 13 Q. Counsel asked you some questions about some of the
12:53:41 14 testimony that you may have heard over the course of these
12:53:43 15 proceedings. Have you heard the government asking some
12:53:47 16 questions about a potential packaging line expansion in
12:53:51 17 Clewiston?

12:53:52 18 A. I have heard that, yes.

12:53:53 19 Q. Do you recall that -- do you recall the United
12:54:01 20 discussions around a potential packaging line expansion at
12:54:06 21 Clewiston?

12:54:07 22 A. I recall that initial discussion very clearly and
12:54:09 23 that's all it was an initial discussion. We thought it
12:54:12 24 would be as simple as adding a line in the Clewiston
12:54:16 25 facility, but what we were quickly made aware of is, that

Wineinger - cross

12:54:20 1 their warehouse is completely full and any expansion of an
12:54:23 2 additional line would take additional warehouse space
12:54:26 3 because you have to have a place to put that before you can
12:54:29 4 ship it, and it's very expensive to build warehouses on the
12:54:33 5 sands of Florida, let's call it, because you have to go so
12:54:36 6 deep with the footings, so it was untenable in terms of the
12:54:41 7 return on that project so it was killed after an initial
12:54:44 8 discussion.

12:54:44 9 Q. Let's put this issue to bed. Did United abandon its
12:54:48 10 plans to engage in a packaging expansion in Clewiston
12:54:51 11 because US Sugar started considering the acquisition of
12:54:54 12 Imperial?

12:54:54 13 A. We did not do it for that reason.

12:55:03 14 Q. Let me just ask you a few final questions.

12:55:07 15 Based on your experience in the sugar industry,
12:55:09 16 what effect do you think this transaction will have on sugar
12:55:12 17 users in the United States?

12:55:13 18 A. Once again, I believe it will actually lower prices
12:55:16 19 because we're going to be an aggressive seller of all of
12:55:19 20 that sugar, not just the sugar that we currently sell today.

12:55:22 21 Q. How do you think the proposed transaction is going to
12:55:25 22 benefit the American farmers that are United members?

12:55:30 23 A. Sure. There are several ways and we have identified
12:55:33 24 these through some strategic work, but first is we think we
12:55:36 25 can decrease our cost per hundredweight for overhead. The

Wineinger - cross

12:55:41 1 distribution savings we talked about, once again, we believe
12:55:44 2 we can share in those which will benefit the American
12:55:48 3 farmer. And lastly, we think we can upgrade our product mix
12:55:50 4 a little bit by improving our product mix that we offer to
12:55:54 5 customers.

12:55:54 6 Q. If US Sugar is permitted to acquire Imperial, will
12:55:57 7 the fact that United is marketing Imperial Sugar enable
12:56:02 8 United to raise prices in any area of the United States?

12:56:05 9 A. Absolutely not.

12:56:06 10 Q. Why not?

12:56:06 11 A. We just wouldn't have that ability to do that.
12:56:09 12 Competitors would quickly flow sugar into that same
12:56:13 13 marketplace, where we were trying to raise prices and would
12:56:16 14 squelch much of any type of a price increase we try to take.

12:56:19 15 Q. Is it United's intention to try to raise prices
12:56:22 16 anywhere in the United States based on the fact that US
12:56:26 17 Sugar will own Imperial?

12:56:27 18 A. It is not.

12:56:28 19 Q. The government's theory in this case is that if this
12:56:32 20 transaction closes, United is going to be able to raise
12:56:35 21 prices in that thirteen state area that they call the
12:56:38 22 southeast, and the other area that they call Georgia and the
12:56:42 23 surrounding states. What's your reaction to that?

12:56:44 24 A. We would not be able to do that. Sugar flows too
12:56:48 25 freely in this country, both from internal sources as well

Wineinger - cross

12:56:51 1 as from imports that come in.

12:56:53 2 Q. And what's the significance of that?

12:56:56 3 A. Once again, any time we would try to raise prices in
12:57:00 4 that area, competitors would flow that sugar in and squelch
12:57:03 5 any type of an increase we would try to take.

12:57:06 6 Q. What about the USDA?

12:57:08 7 A. USDA would have that same power, if they thought we
12:57:13 8 were trying to take advantage of the market they would
12:57:15 9 increase imports as well.

12:57:17 10 MR. BUTERMAN: Thank you. I have no further
12:57:19 11 questions. I apologize, Your Honor, I took a little bit
12:57:21 12 longer than I said I would take.

12:57:24 13 THE COURT: Redirect.

12:57:27 14 MR. HANNA: I may have five minutes.

12:57:30 15 THE COURT: Is it okay, do you mind if we take a
12:57:32 16 break now?

12:57:34 17 MR. HANNA: Your preference.

12:57:36 18 THE COURT: Let's take our break since I have
12:57:38 19 this 1 o'clock call and let's take a little bit longer. I'm
12:57:40 20 not sure how long it will go, so let's say 1:45 we'll come
12:57:42 21 back.

12:57:44 22 (A luncheon recess was taken.)

13:38:52 23 THE COURT: All right. Please be seated.

13:49:05 24 Redirect.

13:49:07 25 MR. HANNA: May I proceed, Your Honor?

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13:49:08 1 THE COURT: Please.

13:49:09 2 REDIRECT EXAMINATION

13:49:09 3 BY MR. HANNA:

13:49:11 4 Q. Mr. Wineinger, just a few more questions.

13:49:13 5 Your counsel asked you some questions about PTX
13:49:17 6 348 in that map where Your Honor targeting your sales. Can
13:49:20 7 we go to that map, please, on slide 31. Your counsel asked
13:49:25 8 you some questions on friendly cross with respect to whether
13:49:31 9 or not you thought this showed where United was going to
13:49:34 10 target sales, whether or not that was in the region that the
13:49:38 11 United States generally alleged in the complaint. Do you
13:49:41 12 recall that testimony?

13:49:43 13 A. I do.

13:49:44 14 Q. And it looked like there were a lot of blue dots in
13:49:48 15 North Carolina, South Carolina, and Georgia. Do you see
13:49:51 16 that?

13:49:51 17 A. There are a lot there, yes.

13:49:53 18 Q. There are lots of dots?

13:49:55 19 A. Depend on your definition of a lot, but yes.

13:49:58 20 Q. Lots of blue dots in Florida, too, right?

13:50:02 21 A. There is dots there, too.

13:50:03 22 Q. I would like you to turn to slide 28 of PTX 348. Do
13:50:20 23 you see the first bullet point that says Siene would likely
13:50:24 24 provided access to attractive southeast demand for key
13:50:25 25 products, do you see that?

Wineinger - redirect

13:50:30 1 A. I see that.

13:50:31 2 Q. Southeast is referring to an area of the country,
13:50:33 3 right?

13:50:33 4 A. It is.

13:50:34 5 Q. And there are presentations that created by United
13:50:39 6 that talks about a southeast market, you're familiar with
13:50:41 7 those, right?

13:50:44 8 A. I am.

13:50:45 9 Q. You understand that there are documents that United
13:50:47 10 created where they talk about a southeast market, right?

13:50:50 11 A. I know what documents you're talking about, yes.

13:50:52 12 Q. And the key products that are being discussed on
13:50:54 13 slide 28 are 50-pound bags and super sacks, right?

13:51:01 14 A. And the rest of that list as well.

13:51:03 15 Q. And the 50-pound bags is the product that on slide 31
13:51:05 16 United was bulk talking about targeting in that area, right?

13:51:12 17 A. Yes, that's what that slide referred to.

13:51:15 18 Q. You can set that document aside.

13:51:17 19 Now, United doesn't offer customers -- doesn't
13:51:20 20 offer customers to buy sugar on tolling arrangements, right?

13:51:30 21 A. That's correct.

13:51:32 22 Q. On your friendly cross, you discussed some synergies
13:51:42 23 that United calculated as a result of an acquisition of
13:51:44 24 United or acquisition of Imperial, right?

13:51:50 25 A. Correct.

Wineinger - redirect

13:51:51 1 Q. And United calculated this synergy at the United
13:51:58 2 level, right?

13:51:58 3 A. That's correct.

13:51:59 4 Q. I think on your friendly cross the only synergy that
13:52:02 5 I think your testimony, the only synergy that was quantified
13:52:07 6 was freight cost savings, right?

13:52:10 7 A. I mentioned overhead costs as well, and the margin of
13:52:14 8 opportunity for opportunity.

13:52:15 9 Q. Margin of opportunity was to sell more 50-pound bags,
13:52:19 10 right?

13:52:20 11 A. More of all of our value added products.

13:52:21 12 Q. Now, you also testified on friendly cross that you
13:52:24 13 have a bigger pool of sugar if US Sugar acquires Imperial,
13:52:30 14 right?

13:52:31 15 A. That's correct.

13:52:32 16 Q. Acquires Imperial, right?

13:52:33 17 A. That's correct.

13:52:34 18 Q. After the merger United would control the sales of
13:52:40 19 two of the four only cane sugar refiners in the United
13:52:42 20 States; right?

13:52:50 21 A. United Sugars will own two of those.

13:52:52 22 Q. There are four cane sugar refiners in the United
13:53:00 23 States, Domino, LSR, US Sugar and Imperial, right?

13:53:02 24 A. That's if you're choosing to exclude supermarkets,
13:53:05 25 CSC and Sucro Can.

Wineinger - redirect

13:53:11 1 Q. And they produce liquid sugar, right?

13:53:13 2 A. Liquid sugar.

13:53:14 3 Q. Now, you also testified, I believe that you think as
13:53:20 4 a result of having this bigger pool of sugar, that United
13:53:23 5 will lower its prices, right?

13:53:25 6 A. I believe that to be true on the portion that
13:53:28 7 Imperial produces, yes.

13:53:29 8 Q. But United never modeled lowering prices when it was
13:53:34 9 running models for synergies, right?

13:53:36 10 A. We did not.

13:53:38 11 Q. Now, you also testified on friendly cross I think
13:53:43 12 that you believe that if you tried to raise prices, the USDA
13:53:48 13 would step in and squelch it, right?

13:53:51 14 A. That's right.

13:53:51 15 Q. Squelch it I think was your word, right?

13:53:54 16 A. Right.

13:53:55 17 Q. Isn't it true that you spend the time and energy to
13:53:58 18 try to influence what USDA does on sugar policies, right?

13:54:03 19 A. Our members participate in that.

13:54:05 20 Q. Your members try to lobby against the USDA bringing
13:54:08 21 in more imports, right?

13:54:11 22 A. Our members take a different view from time to time
13:54:14 23 on that topic.

13:54:16 24 Q. From time to time your members have encouraged USDA
13:54:19 25 to restrict imports, haven't they?

13:54:22 1 A. They have done that.

13:54:23 2 Q. In fact, United is a member of the American Sugar
13:54:28 3 Alliance, right?

13:54:28 4 A. United is not.

13:54:29 5 Q. United's members are a member of the American Sugar
13:54:33 6 Alliance?

13:54:33 7 A. They are, I believe.

13:54:35 8 Q. The very purpose of that alliance is to influence
13:54:38 9 USDA sugar policy in favor of sugar producers in the U.S.?

13:54:42 10 A. I'm unaware. I don't know. I'm not a member.

13:54:46 11 MR. HANNA: No further questions, Your Honor.

13:54:47 12 THE COURT: All right. Thank you.

13:54:49 13 Thank you, sir. You're excused.

13:54:51 14 What's next?

13:54:53 15 MR. HANNA: Your Honor, at this time United
13:54:54 16 States is going to call Julie Campbell, a national account
13:54:58 17 sales manager for Industrial Products. We're calling her by
13:55:01 18 video. I don't believe we need to close the courtroom,
13:55:04 19 though.

13:55:05 20 THE COURT: Okay. Thank you.

13:55:10 21 (Videotape deposition of Julie Campbell:)

13:55:30 22 Q. Can you state your name for the record, please?

13:55:42 23 A. Julie Campbell.

13:55:47 24 Q. And who is your employer?

13:55:48 25 A. United Sugars Corporation.

13:55:50 1 Q. What is your current title?

13:55:52 2 A. National accounts sales manager for industrial
13:55:55 3 products.

13:55:56 4 Q. Can you describe your responsibilities as national
13:56:01 5 accounts sales manager for industrial products?

13:56:03 6 A. Yes. So I am responsible for what we call southeast,
13:56:07 7 which is anywhere from Louisiana to North Carolina from
13:56:11 8 Florida up to Kentucky.

13:56:13 9 I have current responsibility for 60 customers
13:56:18 10 and a prospect list of about 200 customers that I work to
13:56:21 11 try and gain additional business.

13:56:24 12 Q. All right. So you had mentioned that you focus on
13:56:28 13 customers in the southeast region; is that right?

13:56:31 14 A. Yeah. Within the -- my region I described, yes.

13:56:34 15 Q. Right, the specific states that you mentioned, which
13:56:40 16 I think was Louisiana, to North Carolina, Florida to
13:56:45 17 Kentucky; right?

13:56:48 18 A. Correct.

13:56:48 19 Q. As a sales manager in the southeast, as defined by
13:56:51 20 the states you have mentioned, do you have an opinion of who
13:56:52 21 your primary competitors are in the southeast?

13:57:00 22 A. Really, the -- my competition is anyone who sells
13:57:03 23 sugar.

13:57:04 24 Q. What suppliers do you believe that you're most
13:57:08 25 frequently quoting against for business?

13:57:10 1 A. I typically don't always know who I am competing
13:57:14 2 against. But my competitors are going to be Cargill,
13:57:19 3 Domino, Imperial, that -- Western, Michigan; you've got
13:57:25 4 distributors such as Evergreen, Batory, Indiana Sugars, the
13:57:34 5 old Marigold facility, and then imports.

13:57:40 6 Q. So when I asked you what suppliers you believe you're
13:57:44 7 most frequently quoting against for business, you are most
13:57:47 8 frequently quoting for business in the southeast; is that
13:57:50 9 right?

13:57:50 10 A. I am, yeah. I mainly quote for business in the
13:57:53 11 southeast.

13:57:54 12 Q. And you listed Cargill, Domino, Imperial, Western,
13:57:58 13 Michigan, distributors -- you named some specific
13:58:02 14 distributors, and then imports.

13:58:04 15 That is everybody who sells sugar in the
13:58:07 16 country; is that right?

13:58:08 17 A. Almost, yeah.

13:58:11 18 Q. Are there any of these companies that sell sugar that
13:58:14 19 you compete most frequently with in the southeast?

13:58:24 20 A. I am not sure. Majority of time I don't know who I
13:58:32 21 am competing against.

13:58:32 22 Q. And this is going to be document Bates number United
13:58:42 23 DOJ00244181, and let's just take a second to make sure that
13:58:50 24 you can get the document, Julie.

13:58:52 25 What is this document?

13:58:59 1 A. This document is the Bud's Best contract and all the
13:59:05 2 backup for that negotiation.

13:59:07 3 Q. Are you responsible for the customer account of Bud's
13:59:13 4 Best?

13:59:13 5 A. I am.

13:59:14 6 Q. Did you put this file together?

13:59:17 7 A. I did.

13:59:18 8 Q. And why did you keep this file on Bud's Best?

13:59:28 9 A. I always keep pricing documents and documentation of
13:59:32 10 negotiations in case I ever have to refer back to it during
13:59:36 11 the course of the contract.

13:59:37 12 Q. And so do you regularly keep files like this for your
13:59:41 13 customers?

13:59:44 14 A. I try to.

13:59:45 15 Q. Bud's Best makes cookies, is that right?

13:59:50 16 A. Yes.

13:59:51 17 Q. And they are based in Birmingham, Alabama, is that
13:59:56 18 right?

13:59:56 19 A. That is correct.

13:59:57 20 Q. So then if we move up to the page ending in 4187, it
14:00:03 21 should be the bottom of page 7 of the PDF?

14:00:07 22 A. Okay.

14:00:08 23 Q. Here you're e-mailing Robert Schreck on August 4,
14:00:17 24 2020, with the subject line, Bud's Best buyer's bid, 2021.
14:00:22 25 And in this e-mail you're telling him about a buyer's bid

14:00:26 1 that you received from Bud's Best Cookies, is that right?

14:00:30 2 A. That is correct.

14:00:31 3 Q. What is a buyer's bid?

14:00:33 4 A. The buyer's bid is when a customer comes to us and
14:00:37 5 asks if we can meet this price, so they want -- they are
14:00:41 6 looking for us to get to a certain price, so they are asking
14:00:44 7 if we would be willing to book volume at that price.

14:00:48 8 Q. So Bud's Best is asking in his buyer's bid for
14:00:54 9 pricing that is over \$2 less than your July 30th quote; is
14:00:59 10 that right?

14:00:59 11 A. That's right.

14:01:00 12 Q. So now we're kind of going back up, now that we got
14:01:04 13 to the bottom of that e-mail, and a little higher on page 7.
14:01:07 14 There is an e-mail from Dirk Swart to Robert Schreck with
14:01:12 15 you cc'd. Subject line is Bud's Best-buyer's bid 2021.

14:01:14 16 Do you see that?

14:01:20 17 A. I see that.

14:01:21 18 Q. And this is dated August 4, 2020; right?

14:01:25 19 A. Yes.

14:01:26 20 Q. And then he writes, sort of his last sentence there,
14:01:30 21 "meet the price and get the business." Correct?

14:01:32 22 A. That is -- I see that.

14:01:33 23 Q. What did you understand him to mean by "meet the
14:01:40 24 price and get the business"?

14:01:42 25 A. I believe, based on kind of the e-mail that it was,

14:01:51 1 to go ahead and agree to the buyer's bid.

14:01:55 2 Q. So then top of the page, so we are still on page
14:01:59 3 ending in 4187. And this is an e-mail from you to Dirk and
14:02:11 4 to Robert.

14:02:13 5 And you write in the first line, "I have
14:02:19 6 confirmed that we are matching Imperial's quote." Correct?

14:02:24 7 A. I see that.

14:02:25 8 Q. So here you are saying that you have confirmed that
14:02:29 9 Bud's Best is asking for lower pricing from United in order
14:02:31 10 to match a quote that Bud's Best had from Imperial; is that
14:02:38 11 right?

14:02:38 12 A. That's what it says.

14:02:40 13 Q. Did you, in fact, win the business back?

14:02:44 14 A. We did.

14:02:45 15 Q. Of course. While you do that, I will say for the
14:02:49 16 record that Campbell Exhibit 2 has Bates number United
14:02:59 17 DOJ-00231322.

14:03:02 18 So this is an e-mail from you to Jessica Ames,
14:03:06 19 with Cody Bendickson cc'd, dated October 28, 2020. Subject
14:03:15 20 line, United Sugars: Myers WHSE. Does that look right?

14:03:22 21 A. Yep. I see it.

14:03:23 22 Q. So you write in this e-mail, I guess the second line,
14:03:27 23 we had lost Bud's business to Imperial for 2019 -- sorry.
14:03:32 24 That's not -- let me start again.

14:03:34 25 "We had lost Bud's business to Imperial for

14:03:38 1 2020..."

14:03:41 2 Is that right?

14:03:41 3 A. That's what it says, yes.

14:03:43 4 Q. So based on that, do you understand that United had
14:03:46 5 Bud's Best business in 2019?

14:03:48 6 A. I believe so.

14:03:49 7 Q. And then you lost the business to Imperial for 2020,
14:03:54 8 right?

14:03:55 9 A. That's correct.

14:03:57 10 Q. But then you met the buyer's bid and you got the
14:04:01 11 business back for 2021; is that right?

14:04:04 12 A. That is correct.

14:04:07 13 Q. While you do that, I will say for the record that
14:04:11 14 this exhibit, Campbell Exhibit 3, is Bates stamped United
14:04:15 15 DOJ 00245118.

14:04:20 16 And this is an e-mail from Julie Campbell to
14:04:24 17 Robert Schreck, dated June 6th -- sorry, June 12th, 2019.
14:04:34 18 Subject line, Great American Cookie 2020.

14:04:39 19 Is this a customer file that you keep similar to
14:04:42 20 the file you had on Bud's Best?

14:04:44 21 A. Yes.

14:04:45 22 Q. And Great American Cookie is another cookie company,
14:04:51 23 is that fair?

14:04:51 24 A. It is.

14:04:52 25 Q. And they are in Atlanta, Georgia, right?

14:04:54 1 A. That's correct.

14:04:55 2 Q. The first page is an e-mail from you to Robert, your
14:05:04 3 manager, dated June 12th, 2019, correct?

14:05:09 4 A. That is correct.

14:05:10 5 Q. And why were you sending him this e-mail?

14:05:14 6 A. Because Great American Cookie had asked me to
14:05:22 7 re-quote, as they felt my quote was too high.

14:05:28 8 Q. So you write, "GAC has asked for me to re-quote on
14:05:33 9 2020 business. They let me know that my original quote was
14:05:37 10 too high compared to the competition." Right?

14:05:40 11 A. I see that.

14:05:41 12 Q. GAC, does that stand for Great American Cookie?

14:05:46 13 A. It does.

14:05:47 14 Q. What -- what did you consider when you were coming up
14:05:50 15 with this quote suggestion?

14:05:52 16 A. I just consider what my parameters were and since I
14:05:57 17 did not know any information from the customer, as far as
14:06:03 18 how off I was, and knowing that there's a number of
14:06:08 19 competitors that could be in the mix, I wanted to come down
14:06:13 20 enough that they would recognize that, you know, we were
14:06:16 21 trying our best.

14:06:18 22 Q. So here you're confirming for your boss, that in the
14:06:22 23 past Imperial used to sell to Great American Cookie, but
14:06:27 24 Imperial lost the business to United, right?

14:06:32 25 A. That is correct.

14:06:34 1 Q. So, I think you had said earlier that customer
14:06:39 2 service, quality, on time delivery, were examples of things
14:06:44 3 that United can use to try to win business; is that right?

14:06:48 4 A. That is correct.

14:06:50 5 Q. This is Bates number United DOJ 00245121. Just let
14:06:58 6 me know when you have had a chance to open that and review
14:07:02 7 it.

14:07:02 8 It's an e-mail chain between you and Rob. All
14:07:10 9 the e-mails looks like they are dated August 20, 2019,
14:07:14 10 right?

14:07:14 11 A. Correct.

14:07:14 12 Q. And in the bottom e-mail, the first e-mail you sent,
14:07:18 13 you're telling your manager that United did not secure Great
14:07:21 14 American Cookies' business in 2020, is that right?

14:07:25 15 A. That's right.

14:07:25 16 Q. And then in the last sentence of that paragraph to
14:07:29 17 Rob, so kind of your main paragraph in this e-mail, you say,
14:07:34 18 "I believe Imperial might have gotten back in." Do you see
14:07:37 19 that?

14:07:37 20 A. I see that.

14:07:38 21 Q. Why did you believe that?

14:07:40 22 A. It was just an assumption based on them having the
14:07:42 23 business prior. But really, any of our competition could
14:07:44 24 have been in there, and I did not receive any feedback to
14:07:52 25 really know who got the business.

14:07:56 1 Q. And this is Bates number United DOJ 00227037.

14:08:07 2 This document is a number of messages you
14:08:12 3 exchanged with Jonathan Lloyd on April 26, 2019; is that
14:08:17 4 right?

14:08:17 5 A. Yes, that's correct.

14:08:19 6 Q. And Jonathan Lloyd is the sales manager you mentioned
14:08:24 7 who still had some grandfathered accounts in the southeast,
14:08:30 8 is that right?

14:08:30 9 A. That is correct.

14:08:31 10 Q. And he writes at 11:35 a.m., "tell me again the cane
14:08:37 11 basis used for the business you lost."

14:08:40 12 Do you see that?

14:08:41 13 A. I see that.

14:08:42 14 Q. And what did you understand him to be asking for?

14:08:45 15 A. For the Piedmont business.

14:08:48 16 Q. Is that because you had lost the Piedmont business?

14:08:53 17 A. Yes, that is correct.

14:08:57 18 Q. And Jonathan writes at 11:35 that he is looking for
14:09:05 19 insight on Imperial pricing. Do you see that?

14:09:08 20 A. I see that.

14:09:09 21 Q. Do you have an understanding of why the business you
14:09:12 22 lost would have given him insight into Imperial pricing?

14:09:15 23 A. Because I had lost the Piedmont business to Imperial.

14:09:17 24 Q. How did you know that you had lost the business to
14:09:22 25 Imperial?

14:09:22 1 A. They told me. Piedmont told me.

14:09:24 2 Q. And then I am going to ask Sophia to put into the tab
14:09:34 3 G, and this document is Bates number United DOJ 00244734.

14:09:46 4 Is this your file on Piedmont for the 2021
14:09:53 5 contract year?

14:09:54 6 A. Yes, it is. For 2021 business quote, not contract.

14:10:00 7 Q. If we go back to page 7, at the very bottom, so kind
14:10:08 8 of from page 7 going on to page 8, this is a June 16, 2020,
14:10:23 9 e-mail from you to Heath Cagle.

14:10:31 10 And you are providing a price quote; is that
14:10:34 11 right?

14:10:34 12 A. That is correct.

14:10:34 13 Q. And then you respond on July 7, 2020. You write,
14:10:41 14 "could you further elaborate on significant? I know we are
14:10:41 15 freight disadvantaged versus our competition, but it sounds
14:10:51 16 like it is potentially more than this."

14:10:51 17 Do you see that?

14:10:51 18 A. I see that.

14:10:51 19 Q. And what did you mean when you said that?

14:11:02 20 A. Piedmont takes cane super sacks. And for cane super
14:11:02 21 sacks, United Sugars has to use a third-party station to
14:11:13 22 package the super sacks which adds additional costs.

14:11:13 23 Q. What did you mean by "freight disadvantaged"?

14:11:27 24 A. Because we are having to ship bulk product up to our
14:11:30 25 third-party station to repackage and then ship back out to

14:11:35 1 the customer.

14:11:37 2 Q. And when you said I know we are freight disadvantaged
14:11:41 3 versus our competition, what was the competition that you
14:11:44 4 were referring to?

14:11:46 5 A. It would be any other supplier of cane super sacks.
14:11:51 6 So Cargill, Evergreen, Marigold, Imperial, those are the
14:11:58 7 ones that I know can do super sacks.

14:12:01 8 Q. And do you see that August 13, 2020, e-mail from
14:12:09 9 Heath?

14:12:09 10 A. Yes.

14:12:10 11 Q. And so is this a buyer's bid that he's making?

14:12:14 12 A. It looks like it, yes.

14:12:14 13 Q. Is it most common when you get a buyer's bid that the
14:12:20 14 understanding is that there was -- that pricing was received
14:12:24 15 from a competitor?

14:12:25 16 A. Not necessarily.

14:12:26 17 Q. But is that most frequently the case?

14:12:29 18 A. I don't always know. Some buyers, they have a target
14:12:34 19 price that they want to meet or they would like to get and
14:12:38 20 tell, they will just offer that to us.

14:12:42 21 So I never know for sure if there is a
14:12:44 22 competitive offer behind it.

14:12:46 23 Q. And then later on August 13th, you e-mail Heath back,
14:12:51 24 to let him know that you are going to pass on the buyer's
14:12:54 25 bid; right?

Rothman - direct

14:12:59 1 A. Right.

14:12:59 2 Q. And so ultimately, is it the case that Piedmont --
14:13:03 3 that United did not obtain Piedmont's business in 2021?

14:13:08 4 A. That is correct.

14:13:11 5 (End of videotape deposition.)

14:13:16 6 MR. HANNA: Your Honor, at this time the United
14:13:20 7 States moves for admission in the record or evidence PTX
14:13:24 8 459, PTX 461, PTX 464, PTX 465, PTX 469, and finally PTX
14:13:37 9 470, Your Honor.

14:13:38 10 THE COURT: All right. Any objection?

14:13:41 11 MS. DWYER: No objection, Your Honor.

14:13:47 12 THE COURT: What's next?

14:13:49 13 MR. MINCER: Jonathan Mincer for the United
14:13:52 14 States of America. May we proceed with our next witness?

14:13:54 15 THE COURT: Yes, please.

14:14:32 16 COURT CLERK: Please raise your right hand.
14:14:36 17 Please state and spell your full name for the record.

14:14:44 18 THE WITNESS: Dov Rothman, D-O-V, R-O-T-H-M-A-N.

14:14:50 19 DOV ROTHMAN, having been duly sworn was examined
14:14:54 20 and testified as follows:

14:15:02 21 DIRECT EXAMINATION

14:15:02 22 BY MR. MINCER:

14:15:12 23 Q. Good afternoon, Dr. Rothman.

14:15:13 24 A. Good afternoon.

14:15:15 25 Q. Could you please describe your educational

Rothman - direct

14:15:18 1 background?

14:15:19 2 A. I have a BS and a Ph.D. from Berkley and a degree
14:15:26 3 from Cambridge University in the United Kingdom.

14:15:29 4 Q. What did you study in your Ph.D. program?

14:15:32 5 A. I have a Ph.D. in business administration, which is
14:15:38 6 the degree you get when you do the Ph.D. in the business
14:15:41 7 school at Berkeley. Just to avoid confusion, my training is
14:15:47 8 in economics, and in my program I took the core economics
14:15:54 9 class in the economics department.

14:16:00 10 Q. What is your work experience after your Ph.D.?

14:16:01 11 A. I was an assistant professor at the School of Public
14:16:06 12 Health at Columbia University in New York. I am now a
14:16:11 13 managing principal at a firm called Analysis Group. I have
14:16:15 14 been at Analysis Group for about sixteen years. I have also
14:16:20 15 taught a course on economics of merger analysis at Harvard
14:16:24 16 University.

14:16:24 17 Q. Do you have any other professional affiliations or
14:16:29 18 positions?

14:16:29 19 A. I am a senior editor of Antitrust Law Journal. I'm a
14:16:34 20 member of the American Economic Association.

14:16:36 21 Q. Have you published in peer reviewed journals in the
14:16:40 22 field of economics?

14:16:42 23 A. Yes.

14:16:42 24 Q. Have you previously testified in Federal Court as an
14:16:45 25 economic expert in an antitrust merger case?

Rothman - direct

14:16:48 1 A. Yes.

14:16:48 2 Q. Has any court excluded you from testifying as an
14:16:52 3 expert?

14:16:52 4 A. No.

14:16:53 5 MR. MINCER: Your Honor, I would like to offer
14:16:54 6 Dr. Rothman as an expert in the field of economics.

14:16:58 7 MR. YATES: Your Honor, we don't object to
14:16:59 8 Dr. Rothman testifying today. There are some issues we will
14:17:03 9 explore on cross and then address in post-trial briefing
14:17:06 10 consistent with the pretrial order.

14:17:08 11 THE COURT: Okay. So are you objecting or not
14:17:10 12 objecting to him being an expert in the field of economics?

14:17:11 13 MR. YATES: We do not believe he is an expert in
14:17:14 14 the field of economics, no, ma'am, but consistent with the
14:17:21 15 pretrial order, we will address that in the post-trial
14:17:25 16 briefing.

14:17:25 17 THE COURT: Thank you.

14:17:26 18 BY MR. MINCER:

14:17:26 19 Q. Dr. Rothman, have you prepared a slide presentation
14:17:29 20 to assist with your testimony?

14:17:30 21 A. Yes, I have.

14:17:31 22 Q. Did you submit expert reports in this case?

14:17:34 23 A. Yes. An initial report and a reply report responding
14:17:37 24 to defendants' expert, Dr. Hill's report.

14:17:40 25 Q. And will you be referring to the Horizontal Merger

Rothman - direct

14:17:46 1 Guidelines during your testimony today?

14:17:47 2 A. Yes, I will.

14:17:49 3 Q. What are the Horizontal Merger Guidelines?

14:17:52 4 A. The Horizontal Merger Guidelines are a document, they
14:17:57 5 were published in 2010 by the DOJ and FTC, they summarize
14:18:02 6 methods that antitrust economists use to evaluate mergers
14:18:08 7 and acquisitions of competitors.

14:18:09 8 Q. Dr. Rothman, what was your assignment in this case?

14:18:12 9 A. My assignment was to conduct an economic analysis of
14:18:19 10 the likely effects of the proposed acquisition, the likely
14:18:21 11 competitive effects of the proposed acquisition.

14:18:25 12 Q. Did you reach opinions about the likely competitive
14:18:28 13 affects of the proposed acquisition?

14:18:30 14 A. Yes, I did.

14:18:31 15 Q. And what is your overall opinion?

14:18:33 16 A. My overall opinion is that the proposed acquisition
14:18:36 17 would likely lead to a substantial lessening of competition.

14:18:41 18 Q. At a high level in what ways would competition be
14:18:44 19 affected?

14:18:48 20 A. At a high level United and Imperial are two of the
14:18:51 21 largest suppliers of refined sugar to customers in the
14:18:54 22 southeast and in states along the east coast. They compete
14:19:00 23 to supply sugar to the customers, they benefit from this
14:19:03 24 competition, the proposed acquisition would eliminate that
14:19:10 25 competition.

Rothman - direct

14:19:13 1 Q. Could you walk us through how you analyzed the
14:19:16 2 proposed acquisition?

14:19:18 3 A. So, I'll organize this in four steps. Market
14:19:24 4 definition, market participants, shares, and market
14:19:28 5 concentration, competitive effects, and mitigating factors.

14:19:36 6 With respect to market definition, the United
14:19:39 7 States properly defined two relevant economic markets, for
14:19:44 8 purposes of evaluating the competitive effects of the
14:19:47 9 proposed acquisition.

14:19:49 10 The first market is the production and sale of
14:19:52 11 refined sugar to wholesale customers in Georgia and its
14:19:56 12 bordering states. The second market is the production and
14:20:00 13 sale of refined sugar to customers in Georgia, and the
14:20:04 14 bordering states and a few additional states.

14:20:07 15 With respect to market concentration, the
14:20:12 16 proposed transaction would result in highly concentrated
14:20:18 17 markets and it would lead to a substantial increase in
14:20:21 18 market concentration in the United States' relevant markets
14:20:26 19 triggering what's called a presumption of harm under the
14:20:30 20 Horizontal Merger Guidelines.

14:20:32 21 Three, with respect to competitive effects, the
14:20:36 22 proposed acquisition would eliminate head-to-head
14:20:40 23 competition between United and Imperial, and it would
14:20:44 24 further likely soften competition by increasing the extent
14:20:48 25 of what I'll describe as coordinated interaction between

Rothman - direct

14:20:54 1 United and United's largest competitor.

14:20:59 2 Then fourth with respect to mitigating factors,
14:21:02 3 the mitigating factors defendants have put forward would not
14:21:08 4 prevent harm from the proposed acquisition.

14:21:11 5 Q. If we turn to the next slide. After conducting that
14:21:14 6 analysis, what did you find the result would be for
14:21:17 7 customers if the proposed transaction were to consummate?

14:21:21 8 A. So higher prices, and just with respect to the loss
14:21:27 9 of head-to-head competition in the narrower market, higher
14:21:31 10 prices would result in harm of \$30.5 million per year. And
14:21:34 11 in the broader market -- I should say that I'll be sometimes
14:21:41 12 referring to the Georgia and its bordering states market as
14:21:44 13 the narrower market, and the Georgia bordering states plus a
14:21:51 14 few additional states as the broader market.

14:21:55 15 In the broader market, the proposed acquisition
14:21:59 16 would result in harm of \$36.2 million per year. This is
14:22:03 17 just from the elimination of head-to-head competition.

14:22:07 18 And then adding in the effects of increased
14:22:13 19 coordinated interaction, the harm in the narrower market
14:22:18 20 would be \$58.1 million per year. And the harm in the
14:22:24 21 broader market would be \$72.6 million per year.

14:22:28 22 Q. So conducting your analysis, did you learn about the
14:22:34 23 refined sugar industry?

14:22:38 24 A. Yes.

14:22:42 25 Q. How did you do that?

Rothman - direct

14:22:37 1 A. I reviewed a lot of documents and testimony and a lot
14:22:40 2 of data. I reviewed submissions that the parties submitted
14:22:45 3 during the DOJ's investigation of the proposed transaction.

14:22:50 4 Q. And by the parties, you mean the merger parties?

14:22:54 5 A. Yes.

14:22:54 6 Q. What is your understanding of the proposed
14:22:57 7 acquisition?

14:22:59 8 A. That US Sugar would acquire Imperial, and post
14:23:03 9 transaction that United Sugars, which is US Sugar's
14:23:08 10 marketing arm would sell the refined sugar produced at
14:23:11 11 Imperial's Port Wentworth refinery.

14:23:15 12 Q. What is United's role in the refining sugar industry?

14:23:20 13 A. United is a marketing cooperative. It sells the
14:23:25 14 refined sugar produced by US Sugar and three other member
14:23:30 15 owners. The member owners of United don't -- they act as
14:23:36 16 one economic entity with respect to pricing, and United is
14:23:41 17 that one economic entity. And we see this when United
14:23:48 18 refers, for example, to the power of one.

14:23:51 19 Q. What is your understanding of United's objective?

14:23:58 20 A. My understanding of United's objective is to make the
14:24:02 21 most profit for its member owners by selling the most
14:24:06 22 refined -- the most refined sugar at the highest possible
14:24:10 23 prices. I heard testimony earlier today that United's CEO's
14:24:15 24 bonus, for example, is heavily weighted toward net selling
14:24:22 25 price.

Rothman - direct

14:24:23 1 Q. Have you also heard testimony from United that adding
14:24:28 2 Imperial's production of US Sugar would force United to
14:24:31 3 lower prices?

14:24:32 4 A. Yes.

14:24:34 5 Q. What do you think of that?

14:24:35 6 A. Well, I disagree. So post transaction, United would
14:24:42 7 be selling refined sugar that Imperial would have been
14:24:46 8 selling on its own, but Imperial would have been facing
14:24:49 9 competition from United. United would be selling that
14:24:54 10 refined sugar, but it won't be facing competition from
14:24:58 11 Imperial.

14:24:58 12 A logical implication of this argument is that
14:25:01 13 if all of the producers were to join United, United would
14:25:06 14 have more refined sugar to sell, its prices wouldn't go
14:25:14 15 down, it wouldn't be facing any more competition.

14:25:17 16 Q. Turning briefly to customers before diving into your
14:25:21 17 analysis, what kind of customers do sugar refiners sell to?

14:25:25 18 A. Wholesale customers, food and beverage manufacturers,
14:25:30 19 retailers like grocery stores, as well as distributors that
14:25:35 20 buy refined sugar and then resell to other wholesale
14:25:39 21 customers.

14:25:40 22 Q. Does your analysis apply to all of these kinds of
14:25:45 23 customers?

14:25:46 24 A. Yes, it does.

14:25:49 25 Q. What is the role of distributors in the refined sugar

Rothman - direct

14:25:53 1 industry?

14:25:55 2 A. Distributors are, they're purchasers and they serve
14:25:59 3 as a distribution channel for refiners to reach additional
14:26:03 4 customers.

14:26:04 5 Q. So let's turn to the first step in your analysis that
14:26:07 6 you mentioned earlier. You said the first step is market
14:26:10 7 definition. What is an antitrust market?

14:26:14 8 A. So an antitrust market has a product and a geographic
14:26:20 9 dimension. I think of it as a set of competing products
14:26:25 10 sold to customers in a given geographic area.

14:26:29 11 Q. You also referred to a relevant antitrust market.
14:26:32 12 What is a relevant antitrust market in the context of a
14:26:35 13 merger or acquisition?

14:26:38 14 A. A relevant antitrust market is an antitrust market in
14:26:42 15 which there is the potential for a -- a proposed transaction
14:26:45 16 to effect competition, an antitrust market in which the
14:26:50 17 merging firms, the relevant parties compete.

14:26:53 18 Q. What is the purpose of defining relevant antitrust
14:27:00 19 markets when evaluating mergers for acquisition?

14:27:03 20 A. Market definition is meant to assist in the
14:27:10 21 evaluation of competitive effects, it helps to focus and
14:27:13 22 identify the areas where there is the potential for harm
14:27:20 23 from a proposed merger or acquisition.

14:27:23 24 Q. Under the Horizontal Merger Guidelines, how do you
14:27:28 25 determine if a market is properly defined?

Rothman - direct

14:27:32 1 A. A market is properly defined if it's worth
14:27:37 2 monopolizing. And whether a market is worth monopolizing is
14:27:44 3 tested using a tool called the hypothetical monopolist test.

14:27:50 4 Q. What is the hypothetical monopolist test?

14:27:54 5 A. The hypothetical monopolist test ask whether the
14:28:00 6 complete elimination of competition within a market would
14:28:06 7 likely result in higher prices. Higher prices often are
14:28:12 8 referred to as a small but significant nontransitory
14:28:18 9 increase in price which gets abbreviated to SSNIP. If a
14:28:24 10 market leaves out or excludes enough competitively important
14:28:29 11 products, eliminating all of the competition in that market
14:28:34 12 would not necessarily result in higher prices, in which case
14:28:39 13 the market would not pass the hypothetical monopolist test,
14:28:44 14 the market would need to be broadened to include additional
14:28:49 15 competitively important products.

14:28:49 16 If a market includes enough competitively
14:28:54 17 important products, the complete elimination of competition
14:28:59 18 within that market will likely result in higher prices, in
14:29:04 19 which case the market is said to pass the hypothetical
14:29:09 20 monopolist test, it is a market that would be worth
14:29:14 21 monopolizing.

14:29:09 22 Q. To clarify one thing, you referred to the complete
14:29:14 23 elimination of competition in a market. Why is this called
14:29:19 24 a hypothetical monopolist test?

14:29:19 25 A. So one way to think about this is that if you took a

Rothman - direct

14:29:22 1 market and you had a set of competing firms and you gave one
14:29:27 2 of the firms essentially a license to be the only seller to
14:29:31 3 customers in that market, that would eliminate all the
14:29:35 4 competition in the market and that one seller that is given
14:29:39 5 the license to be the only seller would be a monopolist of
14:29:43 6 that market. So the -- eliminating all the competition in
14:29:48 7 the market is effectively creating what gets referred to as
14:29:52 8 a hypothetical monopolist.

14:29:54 9 Q. And if all competition in a candidate market is
14:29:57 10 eliminated, why might prices not go up?

14:30:01 11 A. So if all competition in a market is eliminated, if
14:30:07 12 that market doesn't include enough of the competitively
14:30:11 13 important products, then the elimination of competition in
14:30:15 14 that market would not necessarily result in higher prices.
14:30:18 15 The idea to this, all the competition in the market is
14:30:21 16 eliminated and prices start to go up, but the market doesn't
14:30:24 17 include enough competitively significant products, consumers
14:30:28 18 could substitute to something not included in the market,
14:30:31 19 and that would in some sense defeat the price increase.

14:30:33 20 Q. Turning to the facts of this case, how did you apply
14:30:42 21 the hypothetical monopolist test here?

14:30:44 22 A. I applied the hypothetical monopolist test to the two
14:30:52 23 markets that the United States has alleged. I evaluated
14:30:57 24 whether the complete elimination of competition among
14:31:02 25 producers of refined sugar to sell refined sugar to

Rothman - direct

14:31:04 1 customers that are located in the geographic markets that
14:31:07 2 the United States has defined would likely result in higher
14:31:10 3 prices.

14:31:10 4 Q. And what conclusion did you reach when running that
14:31:13 5 hypothetical monopolist test?

14:31:16 6 A. That the markets the United States has defined are
14:31:20 7 markets that would be worth monopolizing.

14:31:23 8 THE COURT: Did you define the market or were
14:31:26 9 you just using what they did?

14:31:28 10 THE WITNESS: I would say that the United States
14:31:31 11 defined two markets, and I evaluated whether those markets
14:31:34 12 are well-defined antitrust markets for the purposes of
14:31:41 13 evaluating the competitive effects of the proposed
14:31:44 14 transaction.

14:31:46 15 THE COURT: Sorry. Go ahead.

14:31:49 16 MR. MINCER: No problem.

14:31:51 17 BY MR. MINCER:

14:31:51 18 Q. You mentioned earlier that there is a product
14:31:54 19 dimension, a geographic dimension to the market definition.
14:31:57 20 What did you find with respect to the product dimension of
14:32:00 21 market definition?

14:32:03 22 A. The production and sale of refined sugar to customers
14:32:06 23 is a well-defined product market for the purposes of
14:32:10 24 evaluating the competitive effects of the proposed
14:32:13 25 acquisition.

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14:32:15 1 Q. Why is it a relevant product market?

14:32:19 2 A. It's a market that would be worth monopolizing. If
14:32:25 3 competition among all the producers of refined sugar were
14:32:28 4 eliminated, that would likely result in higher prices
14:32:33 5 because for most end uses, refined sugar, there aren't good
14:32:38 6 substitutes for refined sugar.

14:32:40 7 Q. Should the relevant product market be broadened to
14:32:44 8 include resales by distributors?

14:32:47 9 A. No, distributors are purchasers in the product
14:32:51 10 market. And so one way to think about this is that if all
14:32:54 11 of the competition among producers of refined sugar were
14:33:00 12 eliminated, distributors wouldn't be able to prevent prices
14:33:04 13 from going up because the distributors as purchasers that
14:33:10 14 that market would be with hit with the higher prices
14:33:14 15 themselves.

14:33:17 16 Q. Let's turn to the geographic definition of market.
14:33:21 17 What did you find with respect to the geographic dimension.

14:33:27 18 A. That the geographic markets that United States has
14:33:31 19 defined are well-defined geographic markets for the purposes
14:33:35 20 of evaluating the competitive effects of the proposed
14:33:40 21 acquisition.

14:33:40 22 Q. Why are they relevant geographic markets?

14:33:42 23 A. Three related -- I'll describe this in terms of three
14:33:50 24 related reasons. One, competition in the refined sugar
14:33:52 25 industry is regional. Two, United and Imperial are two of

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14:34:02 1 three suppliers that are relatively well situated to supply
14:34:08 2 refined sugar to customers in the United States's geographic
14:34:11 3 markets, so the United States geographic markets are areas
14:34:14 4 of the country in which proposed transaction potentially
14:34:20 5 affects competition. And three, the United States'
14:34:24 6 geographic markets are -- they're markets that would be
14:34:29 7 worth monopolizing. They pass the hypothetical monopolist
14:34:35 8 test.

14:34:35 9 THE COURT: What market wouldn't be worth
14:34:37 10 monopolizing? If you say hypothetically get rid of all the
14:34:41 11 competition, it sounds like anybody could pass the
14:34:44 12 hypothetical monopolist test?

14:34:47 13 THE WITNESS: So a market that doesn't include
14:34:50 14 enough competitively significant products, meaning products
14:34:55 15 that customers in response to higher prices in the market
14:34:59 16 could turn to, that market would not necessarily pass the
14:35:01 17 hypothetical monopolist test.

14:35:04 18 So, for example, this will be a very -- if we
14:35:13 19 thought of the market, a market to purchase milk on a given
14:35:17 20 block, and we -- there were three suppliers of milk on a
14:35:21 21 given block and those three suppliers said we're going to
14:35:24 22 stop competing and we're going to try to raise prices. What
14:35:28 23 would decide that price increase is if the customers could
14:35:32 24 go purchase milk on some other block or across the street or
14:35:38 25 some block that is not included in the market.

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14:35:40 1 And so those three suppliers, if they got --
14:35:45 2 they're on the same block, they try to raise price. What
14:35:48 3 customers would do in response to higher prices is they
14:35:52 4 would buy milk somewhere else. So trying to raise prices,
14:35:56 5 they would lose too many sales which would discourage that
14:35:59 6 price increase. So that market for milk on a given block
14:36:03 7 would be too narrow. And the idea that the market would
14:36:06 8 need to be broadened, because buying milk somewhere else on
14:36:10 9 another street is a good enough alternative to consumers,
14:36:14 10 that in response to higher prices in the market, consumers
14:36:18 11 could go over here to buy milk. And then -- so then the
14:36:22 12 market would get broaden to include that other block.

14:36:26 13 So then the same question would -- we would ask
14:36:29 14 the same question, so now we have a market with two blocks
14:36:33 15 and let's say maybe we have four suppliers, sellers of milk
14:36:37 16 on these two blocks, the question would be if all four of
14:36:41 17 these suppliers were to stop competing with one another, the
14:36:45 18 creation of the hypothetical monopolist, would they be able
14:36:49 19 to increase price. So then the question would be well, if
14:36:53 20 they tried to increase price, how would consumers respond?
14:36:57 21 Would they go three blocks away to purchase milk. And the
14:37:01 22 exercise is to broaden the market out to the point at which
14:37:05 23 the market includes enough of the important options to
14:37:09 24 consumers in the area that if we eliminated all the
14:37:13 25 competition among the suppliers that can sell to that area.

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14:37:20 1 THE COURT: They rather would pay for it than go
14:37:23 2 someplace else?

14:37:24 3 THE WITNESS: Exactly. Exactly.

14:37:27 4 Q. You mentioned earlier, Dr. Rothman that competition
14:37:29 5 in the refined sugar industry is regional. Why do you say
14:37:32 6 that it's regional?

14:37:34 7 A. It's regional because refined sugar is costly to
14:37:40 8 transport long distances. And I think Imperial and NSM
14:37:48 9 illustrate this point well. So this is a map, we have seen
14:37:51 10 this map before. Imperial's refinery is in Georgia. The
14:38:01 11 states that are colored in red here are, this is the Georgia
14:38:04 12 and bordering states region, this is the set of states that
14:38:11 13 United has referred to as the US Sugar Imperial ASR Florida
14:38:14 14 refinery backyard. Among customers that are located in
14:38:21 15 these states, and Georgia and bordering states region,
14:38:24 16 Imperial share is 20 percent.

14:38:31 17 Now if we look, if we go to the far west, the
14:38:34 18 states shaded in gray is labeled, United has referred to
14:38:41 19 this as Amalgamated Crockett and Brawley backyard, is this
14:38:44 20 the backyard for NSM and ASR, Imperial share of customers
14:38:51 21 out in the west is basically zero percent.

14:38:54 22 This isn't an accident. Imperial is well
14:39:01 23 positioned to supply customers in the southeast in the
14:39:04 24 Georgia and bordering states market and then states around
14:39:07 25 there, it's not well positioned to compete with the supply

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of refined sugar to customers in the far west.

Now, if we take NSM, NSM has processing facilities in Minnesota, it has three in Idaho, it has one in California. For customers that are located in the amalgamated Crockett and Brawley backyard, this is an ASR NSM far west backyard, NSM's share to those customers is 47 percent. Among customers that are in the Georgia and bordering states region, that is the US Sugar, Imperial, ASR boarder refinery backyard its share is two percent, this isn't an accident, either, NSM was well positioned to supply customers in the far west, it's not well positioned to supply customers in the southeast and along the east coast.

Q. Why is it relevant that United and Imperial are well positioned to supply customers in the geographic regions alleged in the complaint?

A. This goes back to the purpose of market definition, market definition is consist of the evaluation of competitive effects, it helped us focus on the area in which a merger or acquisition could potentially lessen competition. This is the area in which the elimination of competition between United and Imperial is most likely to matter.

THE COURT: Just to make sure I understand your testimony, you're saying that, so NSM has two percent of this orange market, right, the Clewiston, South Bay and

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14:40:58 1 Imperial.

14:41:00 2 THE WITNESS: Yes.

14:41:01 3 THE COURT: And so your testimony is that if the
14:41:08 4 merged companies raised prices, that the people, that that
14:41:12 5 orange area would just say okay, we're going to pay higher
14:41:15 6 prices, we're not going to try and take NSM's cheaper sugar
14:41:20 7 that they would have to bring us from Minnesota, that's what
14:41:23 8 you're saying?

14:41:25 9 THE WITNESS: I would try to maybe put it a
14:41:28 10 little bit differently, which is that currently customers in
14:41:31 11 this area have NSM as a potential supplier, they have ASR,
14:41:34 12 they have other suppliers. And the question in terms of the
14:41:41 13 evaluation of competitive effects is what the proposed
14:41:44 14 transaction changes. And what its choices are is that we
14:41:51 15 lose the competition to supply customers in this area, the
14:41:54 16 competition between United and Imperial.

14:41:57 17 Now, there is a question about whether in
14:42:00 18 response to prices going up in the geographic markets here,
14:42:03 19 whether a supplier like NSM might in principle choose to try
14:42:10 20 to win more business. And this is where I -- I think this
14:42:13 21 map, though, is helpful, which is a supplier like NSM has a
14:42:20 22 certain amount of sugar that it can sell over a given period
14:42:23 23 of time, and it has an economic incentive to focus on
14:42:30 24 competing in the areas where it's best positioned to
14:42:33 25 compete.

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14:42:35 1 These are -- so NSM's share of sales to
14:42:39 2 customers in the far west is 47 percent, and that's not an
14:42:42 3 accident, it's because it has four processing facilities in
14:42:47 4 that area. NSM is well positioned to compete for customers
14:42:52 5 out there. It's not well positioned to compete for
14:42:55 6 customers in the southeast. And the proposed acquisition
14:42:59 7 wouldn't change that.

14:43:03 8 THE COURT: Okay.

14:43:08 9 Q. Turning to the hypothetical monopolist test which you
14:43:12 10 mentioned that you ran on this candidate market, could you
14:43:16 11 explain how you ran the test here?

14:43:20 12 A. So I evaluated whether the government's geographic
14:43:24 13 markets are markets that would be worth monopolizing. I
14:43:28 14 evaluated whether a complete elimination of competition
14:43:32 15 between producers of refined sugar to sell refined sugar to
14:43:36 16 customers in the government's geographic area markets would
14:43:40 17 likely result in higher prices.

14:43:44 18 Q. What did you find when running the hypothetical
14:43:48 19 monopolist test here?

14:43:52 20 A. That the geographic markets the United States has
14:43:56 21 identified are markets that would be -- that are worth
14:44:00 22 monopolizing, that the complete elimination of competition
14:44:04 23 between producers of refined sugar who sell refined sugar to
14:44:08 24 customers in geographic markets would likely result in
14:44:12 25 higher prices.

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14:44:14 1 Q. Could you please walk us through how your
14:44:18 2 hypothetical monopolist test reached that result?

14:44:23 3 A. So, in response to higher prices from the elimination
14:44:31 4 of competition to supply customers in the government's
14:44:36 5 geographic market, the customers in principle could try to
14:44:43 6 purchase refined sugar outside of the geographic market
14:44:47 7 through what's called arbitrage the purchasing from other
14:44:53 8 customers like distributors that are located outside of the
14:44:55 9 geographic market. I found that arbitrage would not be
14:45:00 10 sufficient to prevent the complete elimination of
14:45:07 11 competition among producers to sell refined sugar to
14:45:11 12 customers in the market to prevent that from increasing
14:45:15 13 prices.

14:45:18 14 Q. And why would turning to distributors be
14:45:23 15 insufficient?

14:45:24 16 A. Turning to distributors that are outside of the
14:45:27 17 market is a high cost option, the distributors would be
14:45:31 18 attaching their own markup to the refined sugar,
14:45:35 19 distributors also generally ship by truck and shipping
14:45:40 20 refined sugar long distance by truck is costly.

14:45:42 21 Q. Throughout your discussion of geographic market
14:45:48 22 definition, you have been referring to competition to supply
14:45:52 23 customers in a given area such as the geographic markets
14:45:56 24 alleged in the complaint. Can you clarify what you mean by
14:45:59 25 that?

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14:46:01 1 A. Yes. See the Horizontal Merger Guidelines explain
14:46:04 2 that geographic markets can be defined around the locations
14:46:09 3 of suppliers or the location of buyers. And when products
14:46:13 4 are delivered to customer locations and pricing is customer
14:46:19 5 specific, and arbitrage is limited, geographic markets are
14:46:23 6 typically defined around the locations of buyers. And in
14:46:28 7 those markets, any supplier that makes sales to customers in
14:46:33 8 the market is a market participant, it's part of the market.
14:46:38 9 So, for example, LSR has -- LSR is what -- LSR is located
14:46:47 10 outside of the geographic market, but it makes sales to
14:46:51 11 customers in the geographic market so it's included in the
14:46:54 12 geographic market. I'll explain in the next few slides that
14:46:58 13 it share is about seven percent. Same with NSM, NSM makes
14:47:04 14 some sales to customers in this geographic market, it's part
14:47:07 15 of the market.

14:47:08 16 Q. And what would the affect be of broadening the
14:47:12 17 market, broadening the geographic market?

14:47:15 18 A. The affect of broadening the geographic market would
14:47:20 19 be to bring in additional customers. They would bring in
14:47:24 20 different additional geographies where there are additional
14:47:28 21 customers. Broadening the geographic markets here wouldn't
14:47:32 22 change anything about the potential effect of the proposed
14:47:36 23 acquisition on the customers that are in, for example, the
14:47:41 24 Georgia and bordering states market, it would just bring in
14:47:45 25 additional customers.

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14:47:55 1 Q. Could you explain a little bit more why it's proper
14:47:58 2 here in this case to define markets around the customers as
14:48:01 3 opposed to around the locations of the suppliers?

14:48:08 4 A. When products are delivered to customer location and
14:48:11 5 pricing is customer specific and arbitrage is limited,
14:48:16 6 geographic markets are appropriately defined around the
14:48:19 7 locations of customers, and then again any seller that makes
14:48:24 8 a sale to customers in the market is part of the market.

14:48:29 9 Q. Besides the geographic markets alleged in the United
14:48:32 10 States's complaint, did you evaluate any other potential
14:48:41 11 geographic markets?

14:48:42 12 A. Yes. Defendants' expert, Dr. Hill, suggested two
14:48:47 13 other geographic markets. A national market and a regional
14:48:52 14 market that includes many of the states in the eastern half
14:48:58 15 of the United States.

14:49:00 16 Q. What is your view -- starting with the national
14:49:03 17 market, what is your view of Dr. Hill's proposed national
14:49:08 18 market?

14:49:08 19 A. The national market doesn't make sense to me. United
14:49:12 20 and Imperial compete in the southeast and in states along
14:49:16 21 the east coast, they don't compete on the west coast of the
14:49:20 22 United States. So a national market would combine areas of
14:49:23 23 the country in which customers have meaningfully different
14:49:30 24 competitive options, it would -- combining areas of the
14:49:32 25 country in which the potential effect of the proposed

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14:49:40 1 acquisition are very different.

14:49:41 2 The purpose of market definition is to assist in
14:49:45 3 evaluation of competitive effects that help to focus in on
14:49:50 4 areas in which there is the potential for harm is highest.

14:49:56 5 Q. What is the result of combining together regions
14:49:59 6 where there are different competitive options?

14:50:03 7 A. The result is that it ends up confusing rather than
14:50:08 8 clarifying the evaluation of competitive effect by combining
14:50:13 9 areas in which the potential effects of the proposed
14:50:17 10 transaction are meaningfully different.

14:50:19 11 Q. Let's turn to Dr. Hill's proposed regional market.
14:50:23 12 What is your view of that proposed market?

14:50:28 13 A. The proceed -- Dr. Hill's proposed regional market is
14:50:35 14 like the United States' geographic market in that it
14:50:39 15 recognizes that the competition is regional. Dr. Hill's
14:50:44 16 regional market is in my opinion too broad. It brings in
14:50:50 17 areas of the country in which customers have meaningfully
14:50:55 18 different competitive options in comparison to customers in
14:50:59 19 the United States's geographic market.

14:51:01 20 So, for example, Dr. Hill's regional market
14:51:06 21 includes Michigan and Ohio which United refers to as the
14:51:11 22 backyard of Michigan Sugar. Customers in Michigan and Ohio,
14:51:16 23 the potential effects of the proposed acquisition for
14:51:21 24 customers in Michigan and Ohio are meaningfully different in
14:51:25 25 comparison to the potential affects of the proposed

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14:51:27 1 acquisition for customers that are in the Georgia -- the
14:51:30 2 United States's geographic market.

14:51:33 3 Dr. Hill's regional market also includes states
14:51:37 4 in the yellow here that are, these are, United has referred
14:51:45 5 to these states as the backyard of ASR and Louisiana
14:51:51 6 refineries R customers in these states have meaningfully
14:51:55 7 different competitive options in comparison to customers in
14:51:58 8 the United States market.

14:52:01 9 By broadening the market, Dr. Hill's regional
14:52:07 10 market combines areas of the country and customers where the
14:52:12 11 potential effect of the proposed acquisition are likely to
14:52:17 12 be meaningfully different, and that doesn't help clarify the
14:52:21 13 analysis of competitive effects, it ends up confusing it.

14:52:28 14 Q. Are is Dr. Hill's proposed regional market defined
14:52:32 15 around the locations of the customers or locations of
14:52:35 16 suppliers?

14:52:37 17 A. It's also defined around the locations of customers.
14:52:41 18 It's defined in terms of where United and Imperial, where
14:52:49 19 there is a potential for harm from the proposed transaction,
14:52:53 20 takes that's like the United States' geographic market. It
14:52:58 21 includes geographic areas in which the potential effects of
14:53:01 22 the proposed acquisition are meaningfully different from the
14:53:04 23 potential effects of the proposed acquisition in the markets
14:53:09 24 that the United States has defined.

14:53:12 25 I know I'm repeating myself. It just goes back

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14:53:14 1 to purpose of market definition serving to help identify
14:53:17 2 where we should really be focusing in terms of where the
14:53:21 3 potential for harm from a proposed acquisition is likely to
14:53:26 4 be the greatest.

14:53:29 5 Q. We have discussed market definition. After analyzing
14:53:33 6 market definition, what was the next step in your analysis
14:53:35 7 of the proposed acquisition?

14:53:38 8 A. The next step is to identify market participants,
14:53:44 9 calculate market shares, and calculate market concentration.

14:53:55 10 Q. What opinion did you reach based on your analysis of
14:53:59 11 market participants, market shares, and market
14:54:02 12 concentration?

14:54:03 13 A. That for both of the government's relevant markets,
14:54:10 14 the post transaction level of market concentration and would
14:54:19 15 be above a threshold outlined in the Horizontal Merger
14:54:23 16 Guidelines and that the change in market competition would
14:54:25 17 also be above the threshold outlined in the Horizontal
14:54:31 18 Merger Guidelines such that the proposed acquisition is
14:54:34 19 presumptively likely to enhance market power.

14:54:38 20 Q. So starting with market participants, what companies
14:54:42 21 did you include as market participants when evaluating the
14:54:46 22 proposed transaction?

14:54:48 23 A. All producers of refined sugar that make sales of
14:54:52 24 refined sugar to customers in the relevant market regardless
14:54:56 25 of where the producers themselves are located.

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14:55:05 1 Q. Does it include sales from outside the country?

14:55:12 2 A. Any producer that makes sales to customers in the
14:55:17 3 relevant markets are included.

14:55:22 4 Q. Do you include distributors as market participants?

14:55:26 5 A. No. Distributors are not included -- I do not
14:55:30 6 include distributors as market participants. Including
14:55:34 7 distributors as market participants would dramatically
14:55:38 8 overstate their competitive significance, vis-a-vis the
14:55:43 9 competitive effects of the proposed acquisition. And I
14:55:48 10 think an analogy I find helpful, Nike sells its shoes
14:55:51 11 through its own Nike stores and it sells its shoes in Foot
14:55:54 12 Lockers. And Adidas sells its shoes in Adidas stores and it
14:56:00 13 sells its shoes in Foot Lockers. If Nike and Adidas were to
14:56:11 14 merge, Foot Locker would not be treated as a market
14:56:14 15 participant in the market in which Nike and Adidas are
14:56:19 16 competing. Foot Locker would not be able to prevent a
14:56:23 17 merger of Nike and Adidas from increasing prices.

14:56:28 18 THE COURT: That's assuming somebody wants a
14:56:31 19 Nike or Adidas shoe rather than a tennis shoe. Right? This
14:56:35 20 is sugar, it's not Nike sugar and Adidas sugar, it's just
14:56:40 21 sugar. Right? Like I can see somebody would want a Nike
14:56:45 22 shoe, but sugar just seems -- do you have an analogy that is
14:56:50 23 more apt to sugar?

14:56:54 24 THE WITNESS: So, I mean I think that one way of
14:56:58 25 thinking about this is that refiners, they sell their

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14:57:03 1 refined sugar directly themselves, you can think of this as
14:57:07 2 the refiners providing the refining and the delivery, and
14:57:11 3 they also make sales to wholesale customers through
14:57:15 4 distributors where distributors are the essentially the
14:57:20 5 distribution partner of the refiner, they're helping the
14:57:24 6 refiners reach other customers. So even though I agree with
14:57:29 7 you that shoes are differentiated products more than refined
14:57:35 8 sugar, the refiners are using distributors to reach other
14:57:41 9 customers.

14:57:42 10 THE COURT: But why aren't the refiners in other
14:57:45 11 areas, before when you were asked, you said well,
14:57:47 12 distributors wouldn't matter because the distributors are
14:57:49 13 still stuck with these refiners, but if the market was such
14:57:51 14 that the prices were going up, and other refiners saw an
14:58:01 15 opportunity to get into that market, why wouldn't those
14:58:04 16 other refiners outside use distributors in that market?
14:58:10 17 Sort of distribute their product there.

14:58:12 18 THE WITNESS: They certainly could. And I think
14:58:14 19 the only distinction that I'm making here is that it's the
14:58:20 20 refiner, that is in this example outside of the market that
14:58:22 21 is imposing a competitive constraint on the merged firm.
14:58:30 22 And whether -- you know, if you have a customer that is
14:58:32 23 purchasing from a distributor, that the distributor bought
14:58:42 24 the refined sugar from a refiner that is outside the market.

14:58:42 25 THE COURT: Let's say ASR.

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14:58:48 1 THE WITNESS: Or NSM. NSM. The distributor
14:58:54 2 isn't bringing additional competition on top of the
14:58:58 3 competition that the NSM is bringing to the merged firm.
14:59:04 4 You can almost think of if you have a distributor making a
14:59:08 5 sale in the market, and it purchased refined sugar from NSM,
14:59:14 6 think of the NSM distributor as a value chain that imposing
14:59:19 7 a competitive constraint on United or Imperial in the
14:59:24 8 relevant market. But NSM and the distributor aren't
14:59:29 9 separately imposing competitive constraints for the sale of
14:59:31 10 refined sugar.

14:59:35 11 THE COURT: Why not?

14:59:37 12 THE WITNESS: Because it's -- the distributor
14:59:43 13 isn't bringing more competition than NSM is.

14:59:47 14 THE COURT: But why not? It's an extra body in
14:59:52 15 there, that's why I'm not understanding why it's not
14:59:55 16 bringing in more competition. If you say I'm going to get a
14:59:59 17 bid from all these people, why isn't the distributor
15:00:02 18 bringing in additional competition?

15:00:05 19 THE WITNESS: So in terms of -- here let me try
15:00:08 20 to go to my analogy, then we can go back to refined sugar.
15:00:12 21 A customer when it's looking to buy Nike shoes could buy
15:00:15 22 Nike shoes in a Nike store or buy Nike shoes from a Foot
15:00:20 23 Locker store. If the customer chooses to buy Nike shoes
15:00:23 24 from the Foot Locker, that's not a bad outcome for Nike --
15:00:30 25 I'm sorry, if the customer chooses to purchase the Nike

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shoes from the Foot Locker, that's not a bad outcome for Nike because Foot Locker would then buy more shoes from Nike.

I want to distinguish between observing that at a given point in time a customer can choose to purchase a product from a distributor and from the producer of the product from the distributor being an independent competitive constraint on the producer of the product. They're just different. When at a given point in time a customer could purchase refined sugar from a distributor that purchase from United or it could choose to purchase refined sugar from United, either way, United wins because the customer purchases the refined sugar from the distributor that purchased from United, the distributor will purchase more refined sugar from United. United is making a sale to that customer through the distributor.

So that in this -- the distributors are more distribution partners for the refiners, even though at a given point in time we could see a customer choosing to purchase the product from a distributor or from a refiner.

THE COURT: Okay.

Q. Just on this topic that the Court was asking about, I think it may help to ask about a couple of things. So first, could you describe the focus of refiners compared to distributors in terms of the customers they focus on?

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15:02:22 1 A. Well, in general they don't necessarily tend to focus
15:02:26 2 on the same customers. Distributors will often sell to
15:02:31 3 customers where they are relative -- they're better
15:02:37 4 positioned to provide the distribution to the customer than
15:02:40 5 a refiner. This is part of what I mean when I describe the
15:02:48 6 distributors as distribution partners for refiners, they
15:02:51 7 help refiners sell to customers that refiners are relatively
15:02:57 8 less well positioned to supply.

15:02:58 9 Q. What are examples, or what is -- what type of
15:03:03 10 customer might a refiner be less well positioned to supply
15:03:07 11 than a distributor is?

15:03:08 12 A. It could be a customer that's looking to purchase
15:03:11 13 relatively smaller volumes of refined sugar.

15:03:20 14 Q. Earlier in the context of geographic market
15:03:24 15 discussion, we discussed the possibility of arbitrage from
15:03:28 16 distributors. It may assist the Court to describe a little
15:03:31 17 bit more why turning to distributors outside the relevant
15:03:35 18 markets wouldn't be a good option for customers in the
15:03:37 19 relevant market?

15:03:40 20 A. So the arbitrage, like it wouldn't be sufficient to
15:03:44 21 prevent prices from going up if all the competition in
15:03:51 22 geographic markets went away and this comes back to
15:03:54 23 purchasing from a distributor that's outside the geographic
15:03:58 24 market, the distributor will attach its own markup to the
15:04:02 25 refined sugar, and again, distributors often ship by, tend

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15:04:08 1 to ship by truck, and shipping refined sugar long distances
15:04:13 2 by a truck is relatively costly.

15:04:17 3 Q. Once you determine the market participants, what was
15:04:20 4 the next step in your analysis?

15:04:23 5 A. To calculate market shares.

15:04:25 6 Q. How did you calculate market shares?

15:04:28 7 A. For each market participant I divided the sales of
15:04:35 8 the define customers in the market and defined that by the
15:04:41 9 total sales of refined sugar to customers in the market.

15:04:45 10 Q. If we could turn to the next slide. What were the
15:04:47 11 results of your market share calculations?

15:04:51 12 A. So in the narrower market, United share is
15:04:57 13 34 percent, Imperial share is 20 percent, ASR share is
15:05:03 14 25 percent, LSR share is 7 percent, CSC share is 3 percent,
15:05:08 15 NSM share is 2 percent, Michigan share is zero percent,
15:05:14 16 Western Sugar share is zero percent, Zucramex zero percent,
15:05:21 17 Sucro Sourcing Sale zero percent, L&S zero percent, imports
15:05:27 18 account for 7 percent.

15:05:29 19 In the broader market, United share is
15:05:33 20 29 percent, Imperial share is 17 percent, ASR share is
15:05:38 21 28 percent, LSR share is 7 percent, CSC share is 6 percent,
15:05:44 22 NSM share is 3 percent, Michigan Sugar share is 1 percent,
15:05:50 23 Western Sugar share is 1 percent, Zucramex share is
15:05:56 24 zero percent, Sucro Sourcing share is zero percent, L&S
15:06:00 25 Sweetener share is zero percent, imports account for 7

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15:06:08 1 percent.

15:06:08 2 Q. Does NSM have sales to some customers in the relevant
15:06:14 3 markets?

15:06:14 4 A. Yes, it does. Its share of sales to customers in the
15:06:18 5 narrower market, is two percent. And its share of sales to
15:06:23 6 customers in the broader market is three percent.

15:06:26 7 Q. After calculating market shares, what was the next
15:06:29 8 step in your analysis?

15:06:32 9 A. To calculate market concentration.

15:06:37 10 Q. How did you calculate market concentration?

15:06:42 11 A. The standard measure of market concentration is a
15:06:47 12 statistic called the Herfindahl Hirschman index, abbreviated
15:06:52 13 HHI. It's calculated by summing shares of all firms in the
15:07:01 14 market, it ranges from 0 to 10,000, a market that has many,
15:07:05 15 many, many suppliers with very, very, very small shares, the
15:07:11 16 HHI would be close to 0. In a market with one, one firm
15:07:15 17 that has a share of a hundred percent, the HHI would be
15:07:18 18 10,000.

15:07:19 19 Q. Are there certain levels of concentration that
15:07:22 20 typically are thought to raise concerns about harm to
15:07:26 21 competition?

15:07:28 22 A. Under the Horizontal Merger Guidelines, a merger or
15:07:32 23 an acquisition that results in a post transaction HHI of
15:07:37 24 greater than 2,500, and a change in HHI of 200 or more is
15:07:42 25 presumed likely to enhance market power.

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15:07:51 1 Q. What market concentration did you find in the two
15:07:54 2 relevant markets here?

15:07:56 3 A. So in the narrower market the post acquisition HHI
15:08:04 4 would be 3,658, the change in HHI would be 1,393. In the
15:08:13 5 broader market, the post acquisition HHI would be 3,035.
15:08:19 6 And the change in HHI would be 1,011.

15:08:23 7 Q. And again, just with these numbers up, what are the
15:08:31 8 thresholds under the Horizontal Merger Guidelines?

15:08:31 9 A. The post acquisition HHI post acquisition HHI is
15:08:37 10 2,500 or more and a change of HHI of 200 or more merger
15:08:43 11 acquisition it would be presumed likely to enhance market
15:08:48 12 power.

15:08:48 13 Q. What are your conclusion based on the market
15:08:52 14 concentration results here?

15:08:53 15 A. Based on the results here the proposed acquisition
15:08:56 16 would be presumed likely to enhance market power in both of
15:09:00 17 the relevant markets.

15:09:00 18 Q. Yesterday did you hear testimony that Imperial sells
15:09:12 19 eleven percent of its refined sugar in Texas?

15:09:16 20 A. Yes.

15:09:17 21 Q. Is that relevant to you?

15:09:22 22 A. I think the point that's relevant here is that a
15:09:28 23 relevant market need not include all of the areas in which
15:09:32 24 there is the potential for harm. Again, the market
15:09:36 25 definition is used just as an evaluation of competitive

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15:09:42 1 factors to identify where to focus, where the potential for
15:09:46 2 harm is the greatest, I would note that in a market that
15:09:51 3 includes Georgia and its bordering state and the additional
15:09:55 4 states in the government's market plus Texas, Oklahoma,
15:10:00 5 Arkansas and Louisiana, the post transaction HHI would be
15:10:05 6 greater than 2,500 and the change in HHI would be greater
15:10:09 7 than 200.

15:10:11 8 Q. What's the relevance of the set of states that you
15:10:14 9 just mentioned?

15:10:15 10 A. So these set of states, Georgia, its bordering
15:10:18 11 states, the broader market plus Texas, Arkansas, Oklahoma
15:10:21 12 and Louisiana, those are the set of states that USDA calls
15:10:24 13 USDA south region.

15:10:34 14 Q. We have discussed market definition and market
15:10:37 15 concentration. What was the next step in your analysis?

15:10:40 16 A. Competitive effects.

15:10:42 17 Q. What are your opinions with respect to competitive
15:10:45 18 effects?

15:10:47 19 A. That the proposed acquisition would eliminate
15:10:50 20 head-to-head competition between United and Imperial. And
15:10:53 21 that it would further soften competition by increasing the
15:11:01 22 extent of coordinated interaction between United and ASR.

15:11:03 23 Q. What would the result be of the two kinds of
15:11:06 24 competitive effects that you just mentioned?

15:11:12 25 A. Higher prices.

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15:11:15 1 Q. Let's start with head-to-head competition. What does
15:11:17 2 the term head-to-head competition mean?

15:11:21 3 A. The term head-to-head competition gets at that United
15:11:26 4 and Imperial compete to supply the same customers, they put
15:11:34 5 competitive pressure on each other. Examples of customers
15:11:38 6 that have switched between United and Imperial are shown
15:11:42 7 here. King Hawaiian, Krispy Kreme, Miller, Coors.

15:11:50 8 One thing I would note that customers benefit
15:11:54 9 from head-to-head competition even when they don't switch
15:11:58 10 between suppliers. So these are switches where a customer
15:12:02 11 was purchasing from United, Imperial, made them a better
15:12:06 12 offer, and the customer switched to Imperial. Customers
15:12:10 13 also benefits from competition where the customer is
15:12:14 14 purchasing from a different supplier, another supplier makes
15:12:18 15 a competitive offer, forces the first supplier to improve
15:12:22 16 its offer and the customer doesn't switch, but the customer
15:12:26 17 still benefits from head-to-head competition.

15:12:30 18 Q. What effect did you find that the proposed
15:12:34 19 acquisition window have on this head to head competition?

15:12:38 20 A. Well the proposed acquisition would eliminate
15:12:42 21 head-to-head competition between United and Imperial because
15:12:46 22 Imperial will no longer be an independent competitor.

15:12:48 23 Q. Let's turn to the second kind of competitive effects
15:12:52 24 that you mentioned, increased coordinated interaction. What
15:12:56 25 does the term coordinated interaction mean?

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15:12:59 1 A. Coordinated interaction arises from strategic
15:13:06 2 behavior where firms, when thinking about what price to set,
15:13:13 3 anticipate how the competitors will respond to the prices
15:13:18 4 they set and they take that into account. And this type of
15:13:22 5 behavior can soften competition. If one firm is thinking
15:13:26 6 about increasing price and it anticipates that its
15:13:32 7 competitors would respond to its higher price by increasing
15:13:37 8 their prices, that threatens everybody's incentive to
15:13:43 9 increase price.

15:13:45 10 Q. Is it necessary for coordinated interaction to be
15:13:50 11 independent antitrust violation?

15:13:55 12 A. No. Coordinated interaction can involve what
15:14:00 13 Horizontal Merger Guidelines refer to as parallel
15:14:05 14 accommodating conduct. This would be -- this could be
15:14:10 15 conduct that's not pursuant to any type of agreement that a
15:14:16 16 lawyer would call unlawful. It's -- but it is -- to the
15:14:21 17 extent that a merger increases that type of market behavior,
15:14:26 18 that can be a way in which a merger can result in harm.
15:14:31 19 Basically by changing the nature of competition by softening
15:14:36 20 competition.

15:14:39 21 Q. Have you seen evidence of coordinated interaction in
15:14:44 22 this case?

15:14:47 23 A. Yes, I have seen direct evidence of coordinated
15:14:52 24 interaction.

15:14:55 25 Q. What kind of direct evidence are you referring to?

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15:14:53 1 A. It's the evidence relating to sending messages to
15:14:58 2 competitors when thinking about what to bid, pulling
15:15:06 3 punches, the sharing of information.

15:15:10 4 Q. Could you provide the Court with just some examples
15:15:14 5 of sending messages and pulling punches?

15:15:20 6 A. So that the relevance to me of the references to
15:15:23 7 things like signal to the market is that it reflects the
15:15:27 8 type of strategic behavior that can soften competition. The
15:15:33 9 idea of signaling to the market is an example of a firm
15:15:38 10 thinking about how would what it chooses to do at a
15:15:43 11 particular point in time, how its competitors would respond
15:15:48 12 to that and taking that into account. Again, this is the
15:15:48 13 type of behavior that can tend to soften competition.

15:15:53 14 Here, this is an e-mail where there -- you know,
15:16:00 15 there is a reference you need to signal to the market that
15:16:04 16 we're going to maintain prices. Recognizing that, what ASR
15:16:12 17 here chooses to do, the market will respond to that and they
15:16:17 18 are taking that into account.

15:16:18 19 Q. Could you provide us with one more example?

15:16:21 20 A. This is an example, what's relevant to me is the
15:16:32 21 reference to sending a message, relaying key messages on, it
15:16:42 22 reflects the strategic behavior from which coordinated
15:16:47 23 interaction arises. Recognizing that what United does here,
15:16:52 24 competitors will see that, will respond to that, and United
15:16:58 25 is thinking through how that affects what it wants to do.

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15:17:05 1 Q. So Dr. Rothman, has the coordinated interaction that
15:17:09 2 you have been discussing affected pricing bids to customers,
15:17:14 3 and without mentioning confidential information that's been
15:17:17 4 redacted here, so without naming specific customer names or
15:17:22 5 prices, could you discuss that?

15:17:25 6 A. Yeah. So this is an example for an unnamed customer.
15:17:32 7 And this is a -- this is behind the scenes at ASR, Adam
15:17:42 8 Whittaker is running, I would like to get aggressive, but
15:17:45 9 Rob asked, Rob Speece does not want to lower the bar at this
15:17:50 10 time. We would like to avoid sending a signal out to
15:17:54 11 competitor.

15:17:57 12 What's relevant to me here is thinking through
15:18:00 13 how are the competitors going to respond to what we do and
15:18:04 14 take that into account.

15:18:09 15 Q. For the next slide I would like to ask the Court to
15:18:12 16 please turn off the public screen. Thank you.

15:18:15 17 Dr. Rothman, what was the result of this
15:18:20 18 coordinated interaction that you discussed in the prior
15:18:24 19 slide, again without naming specific customer names or
15:18:30 20 prices because of confidentiality?

15:18:33 21 A. So again what ended up happening in this instance
15:18:40 22 with this customer is that over the course of --

15:18:43 23 THE COURT: I'm sorry, what document are you
15:18:47 24 looking at again?

15:18:49 25 MR. MINCER: Do you have it on your screen?

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15:18:50 1 THE COURT: No, I have Dr. Rothman's direct file
15:18:53 2 open. And I don't know which of these five things you're
15:18:56 3 looking at.

15:18:58 4 MR. MINCER: I'm sorry, what are you --

15:19:01 5 THE COURT: There are were only five documents
15:19:03 6 in the Rothman direct file that was sent to us.

15:19:11 7 MR. STRONG: What we're looking at now, Your
15:19:12 8 Honor, is JTX 027.

15:19:15 9 THE COURT: That's not in the file, all I have
15:19:18 10 is the report, the reply report, the guidelines and the
15:19:23 11 deposition report.

15:19:26 12 MR. MINCER: Did you receive the presentation.
15:19:28 13 It's JTX 027. It's one of the joint exhibits in this case.
15:19:31 14 So it's both on the slide 21 of the presentation and it's
15:19:41 15 also one of the joint exhibits.

15:19:47 16 THE COURT: Mark, do we have it? It looks like
15:19:51 17 both things we have direct and cross are exactly the same.

15:20:10 18 MR. MINCER: Do you have it now, Your Honor?

15:20:14 19 BY MR. MINCER:

15:20:15 20 Q. Dr. Rothman, what was the result of the coordinated
15:20:18 21 interaction that we saw on the prior slide?

15:20:22 22 A. Well, what ended up happening over the course of this
15:20:24 23 bidding process is that the customer was able to get
15:20:32 24 Imperial and United to bring down their bids. On the
15:20:35 25 previous slide we were looking at it is an e-mail in which

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15:20:44 1 the reference was likely get more aggressive, but Rob
15:20:50 2 Sproull doesn't want to signal to the market getting
15:20:53 3 aggressive on price. And then you can see in the quotes,
15:20:56 4 the Domino quote was quite a bit higher.

15:21:05 5 Q. So if we could turn to the next slide in the
15:21:07 6 presentation, and once that happens, we can turn the public
15:21:12 7 screen back on.

15:21:16 8 Dr. Rothman, you also mentioned that sugar
15:21:19 9 refiners use third parties to share competitively sensitive
15:21:24 10 information. What kind of information are refiners sharing?

15:21:27 11 A. I have seen evidence showing sharing of information
15:21:31 12 about current and future prices, crop yields, sold
15:21:38 13 positions.

15:21:38 14 Q. What's the relevance of the information on crop
15:21:42 15 yields and sold positions?

15:21:46 16 A. It provides information about the extent to which a
15:21:51 17 supplier will or will not be aggressive on price going
15:21:55 18 forward.

15:21:56 19 Q. How do sugar refiners share this information with
15:21:59 20 each other?

15:22:02 21 A. The evidence I have seen they are sharing information
15:22:08 22 through third-party analyst, Mr. Wistisen.

15:22:12 23 Q. In way what ways do sugar refiners share information
15:22:18 24 through Richard Wistisen?

15:22:22 25 A. The instances -- I have seen instances in which

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15:22:25 1 Mr. Wistisen will send an e-mail to United and ASR and
15:22:32 2 asking for information about prices and sold positions and
15:22:39 3 they'll respond and then Mr. Wistisen will take the
15:22:43 4 information that he received from United and share it with
15:22:47 5 ASR's and take the information he received from ASR and
15:22:51 6 share it with United.

15:22:52 7 Q. Could you discuss just a couple of examples of this
15:22:55 8 kind of information sharing? Let's start with the one on
15:22:58 9 the slide now.

15:23:00 10 A. So this is an example from September of 2020.
15:23:04 11 Mr. Wistisen wrote to United's Eric Speece and ASR Alan
15:23:14 12 Henderson on the same day asking for price and sold position
15:23:19 13 information. They both responded pretty quickly. The next
15:23:24 14 day Mr. Wistisen took the information he received from ASR's
15:23:30 15 Henderson and shared it with United Speece and the
15:23:32 16 information he received from United's Speece, shared it with
15:23:36 17 ASR's Henderson.

15:23:39 18 Q. And could you give us one more example?

15:23:43 19 A. This is an example of United Eric Speece sharing
15:23:54 20 information with Mr. Wistisen about likely future pricing.
15:24:00 21 And then Mr. Wistisen sharing what he received from United's
15:24:02 22 Eric Speece with ASR's Alan Henderson.

15:24:14 23 Q. Besides direct evidence of coordinated interaction,
15:24:18 24 have you seen other evidence related to coordination in this
15:24:22 25 case?

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15:24:26 1 A. Yes, there is evidence that that indicates the
15:24:33 2 industry is vulnerable to coordinated interaction. Among
15:24:38 3 the very significant suppliers in the relevant market, there
15:24:42 4 is evidence of strategic interdependence. Again, that's the
15:24:47 5 evidence of recognizing that what one does at one point in
15:24:52 6 time, the competitors will respond to it and take that into
15:24:56 7 account. There is evidence of close monitoring of
15:25:00 8 competitors.

15:25:03 9 Q. Looking at the evidence of coordinated interaction as
15:25:05 10 a whole, what effect do you expect the proposed acquisition
15:25:13 11 to have on this coordinated interaction?

15:25:15 12 A. The proposed acquisition would likely increase the
15:25:18 13 extent of the coordinated interaction by making United
15:25:25 14 larger. That would increase the strategic interdependence
15:25:29 15 for United and ASR, which would increase incentives,
15:25:34 16 increase the incentives to behave strategically and
15:25:38 17 anticipate how each other will respond to each other.

15:25:43 18 In addition, by eliminating Imperial as an
15:25:49 19 independent competitive constraint, the proposed acquisition
15:25:51 20 increases the benefits from coordinated interaction between
15:25:56 21 United and ASR.

15:26:01 22 Q. So we've discussed the elimination of head-to-head
15:26:04 23 competition and increased coordinated interaction. What do
15:26:06 24 you expect to result from these competitive facts?

15:26:12 25 A. Higher prices.

Rothman - direct

15:26:12 1 Q. Did you measure the likely increase in prices?

15:26:18 2 A. Yes. I measured the likely price effects. I used a
15:26:27 3 tool called a GUPPI model, Gross Upper Pricing Pressure
15:26:32 4 Index, as well as a second score bidding merger simulation
15:26:39 5 model. The GUPPI is a screening tool.

15:26:44 6 I'm focusing more today on the second score
15:26:51 7 bidding model, the results are similar, the bidding model is
15:26:54 8 the more sophisticated model, better matches the way in
15:27:01 9 which most refined sugar is sold. And also incorporate, use
15:27:05 10 the bidding model to incorporate the increase in the effect
15:27:09 11 of coordinated interaction.

15:27:11 12 Q. Could you walk the Court through at a high level how
15:27:14 13 a second score bidding model works?

15:27:18 14 A. So, in a second score bidding model, a customer wants
15:27:24 15 to purchase refined sugar and issues an RFP or an RFQ. And
15:27:31 16 suppliers submit the -- the supplier that submits the best
15:27:40 17 bid, wins the contract. And the prices are determined by
15:27:44 18 the second best bid.

15:27:46 19 So in this framework, customers for which United
15:27:51 20 and Imperial are the two best bidders are harmed by the
15:27:56 21 proposed -- would be harmed by the transaction because post
15:27:59 22 acquisition United and Imperial wouldn't bid against each
15:28:04 23 other. And so the harm for these customers would depend,
15:28:09 24 would be determined by how much worse or best it is relative
15:28:14 25 to the second best bid.

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15:28:16 1 Q. What are the key inputs of your second score bidding
15:28:20 2 model?

15:28:21 3 A. Actual state level shares, and United and Imperial
15:28:27 4 margins.

15:28:29 5 Q. How does the model use actually supplier state level
15:28:35 6 shares?

15:28:36 7 A. So one of the key things that the model is used to
15:28:42 8 estimate is the likelihood that customers, that United and
15:28:45 9 Imperial are the two best bidders for a given customer. The
15:28:50 10 model uses actual state-level shares to estimate the
15:28:54 11 likelihood that United and Imperial are the two best bidders
15:28:59 12 for a given customer.

15:29:03 13 Q. And how does the model use actual margins?

15:29:09 14 A. The margins have information about the intensity of
15:29:15 15 competition, about competitive dynamics. The model uses
15:29:19 16 margins so that the model is calibrated to that it reflects
15:29:25 17 the nature of competition to supply given customers.

15:29:30 18 Q. And how does your model compare to market realities?

15:29:41 19 A. Well, it's grounded in market realities because the
15:29:45 20 two key things that the model needs to have are the
15:29:50 21 likelihood that for a customer and United, Imperial, are the
15:29:54 22 two best bidders, it uses actual state-level shares to do
15:29:58 23 that. Then for those customers it needs to estimate how
15:30:03 24 much worse is the third best bid relative to the second best
15:30:07 25 bid and the model uses observed margins to do that.

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15:30:11 1 Q. You mentioned that your model uses both United and
15:30:16 2 Imperial profit margin. Why does your model use both?

15:30:21 3 A. Because they both provide relevant information about
15:30:24 4 competitive dynamics of the nature of competition.

15:30:30 5 Q. Let's discuss the results of your second score
15:30:34 6 bidding model. Looking only at the elimination of
15:30:38 7 head-to-head competition between United and Imperial, what
15:30:41 8 did your second score bidding model find?

15:30:44 9 A. So with respect to the elimination of head-to-head
15:30:48 10 competition in the narrower market, the predicted prices for
15:30:52 11 United is three percent on average, for Imperial
15:30:56 12 4.4 percent, and the weighted average is 3.6 percent. In
15:31:00 13 the broader market, the predicted price effect for United is
15:31:04 14 2.8 percent, for Imperial 4.2 percent, and the weighted
15:31:08 15 3.3 percent. These Predicted Price Effects translate to
15:31:12 16 harm in the narrower market of \$30.5 million per year and
15:31:16 17 harm in the broader market of \$36.2 million per year.

15:31:20 18 Q. Could you put those numbers and prices in the context
15:31:24 19 of this proposed transaction?

15:31:28 20 A. So these are significant price effects in low margin
15:31:32 21 industries, a four percent price effect can be quite
15:31:36 22 significant.

15:31:40 23 Q. And why is the harm higher in the broader market,
15:31:44 24 even though the percentage increase in price effects is
15:31:48 25 lower there?

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15:32:06 1 A. The harm is higher in the broader market, because the
15:32:09 2 broader market includes additional customers, there are more
15:32:14 3 sales in the broader market, so the average harm in the
15:32:18 4 broader market is lower but the total harm is greater
15:32:21 5 because there are more sales in the broader market.

15:32:24 6 Q. And if you were to broaden the market further as
15:32:29 7 Dr. Hill proposes, what would the effect be on the harm,
15:32:33 8 total harm?

15:32:35 9 A. So the effect on the broadening market brings in
15:32:39 10 areas in which the potential effects of the transaction are
15:32:43 11 different from, in the market that is defined, that effects
15:32:50 12 the harm for customer, but in a broader market there are
15:32:54 13 more sales, so the total mark would be greater.

15:32:58 14 Q. Did you also measure the prior effects that are
15:33:02 15 likely to happen with increased coordinated interaction?

15:33:04 16 A. Yes.

15:33:10 17 Q. How do you use that?

15:33:11 18 A. I used the bidding market and I estimated the price
15:33:14 19 effect of the transaction under scenarios in which
15:33:18 20 pre-transaction, United and ASR refrain from bidding against
15:33:22 21 each other on a certain percentage of opportunities and post
15:33:26 22 transaction they refrain from bidding against each other on
15:33:30 23 a certain percentage of opportunities. I considered all
15:33:34 24 possible scenarios in increments of at least ten percent, so
15:33:38 25 a scenario in which pre-transaction United and ASR forgo

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15:33:47 1 bidding against each other for ten percent of opportunities
15:33:50 2 and post transaction it increases to 20 percent or to
15:33:55 3 30 percent or to 40 percent. Across the ranges, these
15:34:00 4 scenarios of Predicted Price Effects range from four percent
15:34:05 5 to twelve percent.

15:34:07 6 Q. And what scenario did you use to report price effects
15:34:11 7 here?

15:34:12 8 A. I reported price effects and harm estimate for one of
15:34:17 9 the scenarios, the scenario in which pre-transaction, United
15:34:22 10 and ASR refrain from bidding against each other on ten
15:34:27 11 percent of opportunities, post transaction it goes to
15:34:31 12 thirty percent.

15:34:33 13 Q. Is that the scenario that showed the highest price
15:34:37 14 effects?

15:34:39 15 A. No. That's the price effects for that scenario are
15:34:44 16 closer to the lower end of the range I just described.

15:34:49 17 Q. If we could turn to the next slide. What were the
15:34:52 18 results in your bidding model when you added in the effects
15:34:56 19 of increased coordinated interaction using the scenario that
15:35:01 20 you just mentioned?

15:35:02 21 A. So for this scenario in the narrow market the
15:35:05 22 predicted price effect for United is 5 percent. For
15:35:09 23 Imperial it's 6.6 percent. For ASR it's 2.1 percent. And
15:35:14 24 the weighted average for United and Imperial is 5.7 percent.
15:35:19 25 In the broader market, the price effect for United is

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4.8 percent. For Imperial it's 6.4 percent. For ASR it's 1.9 percent. And the weighted average for United and Imperial is 5.4 percent. These higher price is translate to harm of \$58.1 million per year in the narrower market and \$72.6 million per year in the broader market.

Q. So before turning to the last step in your analysis, I just would like to ask you one question about your GUPPI analysis because defendants' counsel put in their opening slides that there was a difference between the price effects shown in your initial report and your reply report. Could you explain why there was a difference?

A. Sure. So in the GUPPI model, one of the inputs the to the GUPPI model is price ratio. In my initial report I flipped one of the price ratios, which had the effect of increasing the predicted price effect for United a little bit and decreasing the predicted price effect for Imperial. That is, the weighted average, the effect on that on the weighted average price is very small. The other change that I made between the initial report and the reply report is I updated the analysis to use 2021 data. And the predicted GUPPI between the initial report and the reply report changed almost entirely because of updating the analysis to 2021 data.

The flipping of the price ratio, when I corrected that and the reply report, that's a very, very

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15:37:26 1 small effect on the GUPPI. I think the point is just what I
15:37:30 2 heard referenced in the opening in terms of how the
15:37:32 3 Predicted Price Effects from the GUPPI's changed is that
15:37:36 4 this was really driven by using 2021 data which I think has
15:37:43 5 when I prepared my initial report and subsequent to
15:37:46 6 preparing the initial report and the reply report I updated
15:37:52 7 everything to 2021 data.

15:37:53 8 Q. Let's turn to the last step in your analysis,
15:37:56 9 mitigating factors. Which purported mitigating factors put
15:38:04 10 forward by defendants did you consider here?

15:38:08 11 A. The US Sugar Program. An argument about Imperial's
15:38:14 12 competitive significance going forward in the absence of a
15:38:20 13 transaction. Entry and expansion. And claimed
15:38:24 14 efficiencies.

15:38:26 15 Q. What overall opinion did you reach regarding the
15:38:29 16 mitigating factors put forward by the Defendants?

15:38:32 17 A. That they wouldn't be sufficient to prevent harm from
15:38:35 18 the proposed acquisition.

15:38:37 19 Q. So let's start with the first reported mitigating
15:38:41 20 factors, the US Sugar Program. What is your understanding
15:38:44 21 of the US Sugar Program?

15:38:47 22 A. That the USDA has a dual mandate to one, manage the
15:38:52 23 supply of sugar to keep sugar prices above loan forfeiture
15:38:57 24 level, and two, to manage the supply sugar of and to ensure
15:39:02 25 adequate supplies of raw and refined sugar.

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15:39:05 1 Q. Starting with the first mandate, did you find that
15:39:08 2 keeping sugar prices above forfeiture levels would help
15:39:13 3 address the competitive effects of the proposed acquisition?
15:39:16 4 A. No. The first mandate is to keep prices elevated, so
15:39:21 5 that would not prevent, the proposed acquisition from
15:39:26 6 increasing prices.

15:39:27 7 Q. What about the second mandate of managing the supply
15:39:31 8 of sugar to ensure adequate supplies of raw and refined
15:39:34 9 sugar. Would that address the competitive effects of the
15:39:36 10 proposed acquisition?

15:39:38 11 A. Higher prices from the lessening of competition from
15:39:41 12 the proposed acquisition wouldn't threaten the adequacy of
15:39:45 13 the supply of sugar, no.

15:39:52 14 Q. Let's turn to the second purported mitigating factor,
15:39:56 15 Imperial's competitive significance going forward in the
15:39:58 16 absence of the proposed transaction. What is your
15:40:01 17 understanding of that argument by defendants?

15:40:06 18 A. My understanding of the argument is that Imperial's
15:40:10 19 current level of competitive significance overstates its
15:40:14 20 level of competitive significance going forward in the
15:40:17 21 absence of the transaction.

15:40:19 22 Q. What is your opinion about this purported mitigating
15:40:23 23 factor?

15:40:26 24 A. I don't think that argument is supported. Imperial's
15:40:29 25 share has been stable. I evaluated for both the narrower

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15:40:36 1 and the broader market Imperial's share over the 2018 to
15:40:42 2 2021 period. In the narrower market Imperial's share was
15:40:47 3 19 percent in 2018, 20 percent 2021, in the broader market
15:40:53 4 Imperial's share in 2018 was 14 percent, 17 percent in 2021.

15:41:03 5 Q. Let turn to the third purported mitigating factor.
15:41:07 6 Entry and expansion. What are the principles that guide
15:41:10 7 your analysis of potential entry and expansion?

15:41:14 8 A. So the principal of the concept is that in response
15:41:21 9 to a lessening of competition, that potentially could make a
15:41:28 10 market more attractive to other supplies because prices and
15:41:34 11 profits are higher. Which would attract entry or expansion
15:41:39 12 and potentially offset a lessening of competition under the
15:41:45 13 guidelines for that to happen the entry or the expansion
15:41:49 14 would need to be timely, likely and sufficient.

15:41:54 15 Q. What opinion did you reach regarding potential entry
15:41:59 16 and expansion in this case?

15:41:59 17 A. That entry and expanding would not offset, would not
15:42:04 18 prevent the harm from the proposed acquisition.

15:42:06 19 Q. And what's the basis for that opinion?

15:42:11 20 A. So one of two arguments that has been made is that
15:42:17 21 suppliers that have small shares of sales to customers in
15:42:21 22 the relevant markets in response to a lessening of
15:42:27 23 competition in the relevant markets would shift focus and
15:42:32 24 try to compete more in the relevant markets in response to
15:42:38 25 higher prices. And I think what this misses is the

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15:42:41 1 suppliers have an economic incentive to compete, focus where
15:42:46 2 they compete, where they're relatively well situated to
15:42:50 3 compete. So we talked about this earlier.

15:42:54 4 NSM is well situated to compete for customers in
15:42:58 5 the far west by virtue of it has four processing facilities
15:43:03 6 out there. It's not well situated to compete for customers
15:43:08 7 in the government's geographic markets. The proposed
15:43:12 8 acquisition wouldn't change that.

15:43:17 9 Q. Defendants also point to recent examples of entry and
15:43:20 10 expansion by melters. What are melters?

15:43:23 11 A. Melters are -- melters produce liquid sugar.

15:43:29 12 Q. What kind of liquid sugar do they produce?

15:43:33 13 A. High color liquid sugar.

15:43:40 14 Q. Do they produce dry sugar?

15:43:42 15 A. No.

15:43:42 16 Q. What is your opinion of the examples put forward by
15:43:46 17 defendants?

15:43:46 18 A. That expansion by melters would not present harm from
15:43:51 19 the proposed acquisition. Around 80 percent of the refined
15:43:52 20 sugar sold in the relevant market is dry granulated sugar.
15:44:00 21 Melters don't produce that. We have here on the screen from
15:44:05 22 CSC which is a melter, its founding CEO's testimony that it
15:44:12 23 doesn't compete with the merging parties.

15:44:21 24 Q. Let's turn to the last purported mitigating factor.
15:44:22 25 Efficiencies. What are your principles that guide your

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15:44:31 1 analysis of the claimed efficiencies?

15:44:35 2 A. Under the Horizontal Merger Guidelines efficiency are
15:44:39 3 credited if they are supported, they're verifiable, they're
15:44:44 4 not speculative. If they are merger specific, they likely
15:44:48 5 happen with the proposed transaction and unlikely to happen
15:44:52 6 in the absence of the proposed transaction. And to offset
15:44:57 7 harm, efficiencies also need to be passed through to
15:45:03 8 customers that efficiency can't just serve to increase the
15:45:08 9 profits of the merger firms.

15:45:09 10 Q. What opinions did you reach regarding Defendants'
15:45:15 11 claimed efficiencies here?

15:45:17 12 A. That the efficiencies defendants have put forward
15:45:21 13 either aren't efficiencies or wouldn't come close to
15:45:24 14 offsetting the harm from the proposed acquisition.

15:45:27 15 Q. Let's discuss each of the three claimed efficiencies
15:45:31 16 that Defendants' have put forward. What did you find with
15:45:34 17 respect to the defendant claim that they will increase the
15:45:37 18 amount of domestic raw sugar that the Imperial plant
15:45:43 19 obtains?

15:45:44 20 A. So just increasing the amount of domestic raw sugar
15:45:49 21 purchased is not in and of itself an efficiency. The
15:45:54 22 purchasing is more of a given input. Defendants also have
15:46:00 23 not claimed that this would result in cost savings that
15:46:05 24 would translate into -- that would serve to offset harm.

15:46:10 25 Q. Turning to the second claimed efficiency, what did

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15:46:15 1 you find with respect to Defendants' claim that they will
15:46:18 2 increase production at Port Wentworth?

15:46:22 3 A. Again, this is not in and of itself an efficiency, it
15:46:28 4 is an operational aspiration, desire to run a facility with
15:46:33 5 more shifts, that by itself is not efficiency, it's a
15:46:40 6 different operational choice.

15:46:46 7 Q. Is it a choice that's related to the proposed
15:46:49 8 transaction?

15:46:55 9 A. Well, it's a choice that US Sugar is saying we would
15:46:58 10 like to do. With respect to mergers specificity, there is a
15:47:04 11 question of US Sugar wants to make this choice, is this a
15:47:10 12 choice that Imperial is going to make on its own.

15:47:12 13 Q. Finally turning to the third claimed efficiency, what
15:47:15 14 did you find with respect to the defendants' claimed they
15:47:18 15 will reroute certain shipments based to the relative
15:47:31 16 transportation cost?

15:47:31 17 A. So to begin with, defendants' expert, Dr. Hill
15:47:34 18 assumes costs savings of 12 to \$13 million. I think we
15:47:41 19 heard a lower number today. Even the costs savings,
15:47:42 20 distribution cost savings for 12 to \$13 million, those
15:47:50 21 savings wouldn't be close to offsetting the harm from the
15:47:52 22 proposed acquisition.

15:47:52 23 We also heard this week that in modeling the
15:48:00 24 potential cost savings, distribution cost savings, there is
15:48:02 25 no clear -- there was not any contemplation of to what

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15:48:08 1 extent these would get passed through to consumers. The
15:48:12 2 working assumption is that any savings would go back to the
15:48:15 3 member owners.

15:48:18 4 MR. MINCER: Thank you, Dr. Rothman. No further
15:48:20 5 questions on direct, Your Honor.

15:48:21 6 THE COURT: Let's take our afternoon break and
15:48:23 7 then we'll come back for cross.

15:48:25 8 (A brief recess was taken.)

16:05:40 9 THE COURT: All right. Please be seated.

16:05:41 10 MR. YATES: May I proceed, Your Honor?

16:05:41 11 THE COURT: Please.

16:05:41 12 CROSS-EXAMINATION

16:05:41 13 BY MR. YATES:

16:05:50 14 Q. Good afternoon, Dr. Rothman. Nice to see you again.

16:05:51 15 A. Good afternoon. Likewise.

16:05:54 16 Q. Dr. Rothman, do you recall that in your direct
16:05:56 17 presentation, you had a slide on head-to-head competition
16:06:01 18 examples?

16:06:01 19 A. Yes.

16:06:02 20 Q. Okay. And you wrote in your reply report in this
16:06:02 21 case that it is necessary to look across many customers to
16:06:11 22 evaluate the extent of head-to-head competition; correct?

16:06:12 23 A. The specific words we can look at them, the general
16:06:24 24 principles sound reasonable.

16:06:25 25 Q. Okay. But you can't tell me for how many customers

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16:06:30 1 in the alleged relevant markets Imperial and United compete
16:06:34 2 head to head on price, can you?

16:06:39 3 A. The total number, I have not done that calculation.

16:06:42 4 Q. You haven't done that calculation, correct, that's
16:06:44 5 what you told me in deposition?

16:06:46 6 A. That's correct.

16:06:48 7 Q. Okay. In fact in your deposition less than three
16:06:52 8 weeks ago, you testified that you had not done a calculation
16:06:54 9 to determine whether Imperial and United competed for the
16:06:56 10 business of more than five percent of the customers in the
16:07:00 11 alleged markets from a head-to-head price standpoint,
16:07:02 12 correct?

16:07:04 13 A. Again, I believe I said that I hadn't done an
16:07:10 14 analysis that quantifies the total number of -- total amount
16:07:14 15 of head-to-head competition.

16:07:16 16 Q. And during your deposition, you testified that you
16:07:20 17 didn't know how many instances United had actually lowered
16:07:24 18 its price in response to an Imperial price; correct?

16:07:26 19 A. Correct. I think I said I hadn't done an analysis
16:07:30 20 that quantifies that specific number.

16:07:32 21 Q. And I also asked you in deposition if you could tell
16:07:36 22 me on how many occasions Imperial had lowered a price in
16:07:40 23 response to a United price and you told me you hadn't done
16:07:42 24 that calculation either, right?

16:07:44 25 A. Yes, that's correct.

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16:07:51 1 Q. And you haven't attempted to quantify how often
16:07:57 2 United competes with Imperial as opposed to other suppliers
16:08:01 3 of sugar in the marketplace; correct?

16:08:09 4 A. In terms of the analysis that I think you were asking
16:08:13 5 me about, I think what I told you is that I hadn't done that
16:08:17 6 specific analysis.

16:08:20 7 Q. Let's take a look at some demonstratives, including
16:08:25 8 one of your slides. This is a slide that you went through
16:08:30 9 in your opening -- strike that.

16:08:32 10 This is a slide you went through in your direct
16:08:35 11 testimony; correct?

16:08:36 12 A. That is correct.

16:08:37 13 Q. Okay. And this has examples of head-to-head
16:08:41 14 competition, and this is drawn from paragraphs 132 to 153 of
16:08:44 15 your opening expert report in this case, correct?

16:08:51 16 A. That sounds right. I haven't memorized the
16:08:54 17 paragraphs.

16:08:56 18 Q. And you told me in deposition that beyond the
16:09:01 19 examples in those paragraphs of your opening expert report,
16:09:04 20 you were not aware of any other specific instances of
16:09:10 21 head-to-head competition; correct?

16:09:14 22 A. I think I said that I didn't have other examples
16:09:17 23 sitting there, correct.

16:09:19 24 Q. And during questioning by the government today, you
16:09:22 25 said that these were examples of head-to-head competition

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16:09:31 1 between Imperial and United; correct?

16:09:35 2 A. That sounds right.

16:09:36 3 Q. And I think you said that these are even examples of
16:09:39 4 switching between Imperial and United, correct?

16:09:47 5 A. That sounds right.

16:09:48 6 Q. That was your testimony just a little while ago on
16:09:51 7 direct; correct?

16:10:00 8 A. I believe so, yeah. Whether -- I was probably
16:10:05 9 talking about switching as well, head-to-head competition
16:10:10 10 also plays out when there isn't actually a switch from one
16:10:15 11 to the other.

16:10:15 12 Q. You did say that, but you said these were examples of
16:10:18 13 switches, too; correct?

16:10:21 14 A. I may have said, yeah, the specific words, I remember
16:10:28 15 discussing switching and then head-to-head competition when
16:10:31 16 there wasn't a switch.

16:10:31 17 Q. So there are seventeen customer logos on this slide
16:10:37 18 from your direct; correct?

16:10:41 19 A. I believe that's right.

16:10:42 20 Q. And I think the Court is going to hear testimony from
16:10:48 21 four of them, Brill, the Piedmont Candy Company, the person
16:10:54 22 who testified this morning, Danone and General Mills who
16:10:57 23 testified on the first day of trial; is that right?

16:11:01 24 A. That sounds right. I don't have the witness order.

16:11:05 25 Q. And you're not aware of any evidence that's to be

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16:11:08 1 presented at this trial from any of the other supposed
16:11:12 2 examples of head-to-head competition and switching, are you?
16:11:20 3 A. Sitting here right now, I don't have examples.
16:11:24 4 Q. One of the companies whose testimony will be
16:11:29 5 presented at this trial is Danone. You know that, right?
16:11:34 6 A. In terms of the list of witnesses, I have watched the
16:11:41 7 proceedings to this point. I don't have a list in front of
16:11:44 8 me in terms of what's happening going forward.
16:11:46 9 Q. Fair enough. You're aware that Danone provided a
16:11:50 10 deposition as part of the discovery process and you cited
16:11:54 11 that in your reports, correct?
16:11:56 12 A. Yes, I believe so.
16:11:57 13 Q. Did you read that deposition, sir?
16:12:01 14 A. Yes.
16:12:02 15 Q. Okay. Let's see what Danone's vice-president
16:12:04 16 actually said. This is from Mr. Buterman's opening.
16:12:15 17 "At any time in the last four years has Danone
16:12:17 18 purchased sugar from Imperial?"
16:12:20 19 "Not that I'm aware of."
16:12:22 20 Were you aware of that testimony, sir, before
16:12:24 21 today?
16:12:25 22 A. I read the deposition transcript.
16:12:27 23 Q. Do you recall that that was Danone's testimony that
16:12:30 24 they had purchased no refined sugar from Imperial in the
16:12:34 25 past four years?

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16:12:37 1 A. I don't recall that specific testimony.

16:12:40 2 Q. And the Danone representative was also asked, "Does
16:12:45 3 Imperial compete for Danone's business?"

16:12:48 4 And the response was, "I would say they do not
16:12:50 5 necessarily compete for Danone's business because they have
16:12:54 6 not provided any bids for our business."

16:12:57 7 Do you see that?

16:13:01 8 A. Yes.

16:13:02 9 Q. But Danone is one of your examples of alleged
16:13:04 10 head-to-head competition and switching, correct?

16:13:10 11 A. It is one of the examples of head-to-head
16:13:13 12 competition.

16:13:13 13 Q. And General Mills is another example that you claimed
16:13:17 14 of head-to-head competition between United and Imperial,
16:13:21 15 correct?

16:13:22 16 A. Yes.

16:13:24 17 Q. Are you aware that Mr. Riippa testified yesterday,
16:13:28 18 that General Mills has not contracted with Imperial to
16:13:32 19 provide any bulk refined sugar to any of its, I think you
16:13:36 20 said dozen plus, fifteen co-packing plants in the United
16:13:40 21 States. Were you aware of that testimony, sir?

16:13:42 22 A. I saw portions of that testimony. I'm not -- I don't
16:13:46 23 dispute it. I don't specifically recall it.

16:13:50 24 Q. Let's switch gears. You have never offered an
16:13:54 25 opinion in a case involving an agricultural cooperative

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16:14:01 1 before this one, have you?

16:14:05 2 A. That's correct.

16:14:06 3 Q. And you have never offered an expert opinion in a
16:14:10 4 case where the United States Department of Agriculture's
16:14:14 5 actions were relevant to the supply of the product at issue,
16:14:18 6 correct?

16:14:20 7 A. That's correct.

16:14:21 8 Q. You're not claiming to be an expert on the USDA's
16:14:25 9 management of the US Sugar program, are you?

16:14:29 10 A. No.

16:14:31 11 Q. And you're not claiming to be an expert in the laws
16:14:34 12 and regulations that the USDA administers as part of the US
16:14:38 13 Sugar program, are you?

16:14:41 14 A. No.

16:14:42 15 Q. You're testifying here on behalf of the plaintiff,
16:14:45 16 the United States of America; correct?

16:14:51 17 A. That's my understanding, I think on behalf of the
16:14:54 18 Department of Justice.

16:14:55 19 Q. Fair enough.

16:14:57 20 Did you speak with any employees of the United
16:15:01 21 States Department of Agriculture in connection with forming
16:15:04 22 your opinions in this case?

16:15:07 23 A. I don't believe so.

16:15:09 24 Q. Did you ask a single question to the Department of
16:15:12 25 Agriculture about its role in the refined sugar industry in

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16:15:16 1 the United States?

16:15:21 2 A. I certainly reviewed materials from the Department of
16:15:25 3 Agriculture, but I don't recall asking a question of the
16:15:28 4 Department of Agriculture.

16:15:30 5 Q. Even though the plaintiff in this case is the United
16:15:33 6 States of America, you didn't interview anyone from the
16:15:37 7 Department of Agriculture and ask them any questions about
16:15:39 8 the USDA's role in the refined sugar industry, did you?

16:15:45 9 A. No, as I said, I reviewed materials from the
16:15:49 10 Department of Agriculture, USDA but I did not conduct an
16:15:54 11 interview.

16:15:55 12 Q. And you didn't speak to anyone at the Department of
16:15:57 13 Agriculture about the Department of Agriculture's views
16:15:59 14 about this transaction, did you?

16:16:02 15 A. Me personally, no.

16:16:07 16 Q. You didn't ask a single question to any employee of
16:16:10 17 the Department of Agriculture, about whether your opinions
16:16:14 18 are consistent with their view of the economic realities of
16:16:18 19 the refined sugar marketplace of the United States, did you?

16:16:22 20 A. I did not have that conversation with anyone from the
16:16:27 21 Department of Agriculture.

16:16:28 22 Q. Dr. Rothman, you don't have a Ph.D. in economics, do
16:16:32 23 you?

16:16:33 24 A. No.

16:16:35 25 Q. And you don't hold an advanced degree in agricultural

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16:16:40 1 economics either, do you?

16:16:42 2 A. No.

16:16:48 3 Q. Now, let's take a look at what you said about the
16:16:51 4 USDA in your direct testimony here today. I think in your
16:16:57 5 direct testimony, you talked about the US Sugar Program and
16:17:01 6 you talked about the USDA having a dual mandate. Do you
16:17:06 7 recall that?

16:17:08 8 A. Yes.

16:17:10 9 Q. Now, you didn't include anything in this slide that
16:17:14 10 you presented to the Court to summarize your opinions about
16:17:21 11 whether part of the USDA's role is to ensure supply of raw
16:17:27 12 and refined sugar at reasonable prices, did you?

16:17:35 13 A. No. But including those words wouldn't change the
16:17:41 14 dual mandate.

16:17:42 15 Q. You don't think including the words "manage the
16:17:46 16 supply of sugar to ensure adequate supplies of raw and
16:17:49 17 refined sugar at reasonable prices" would change your views
16:17:53 18 of the USDA's mandate?

16:17:55 19 A. So with respect to the second mandate, my
16:17:58 20 understanding is it's to manage the supply of sugar to
16:18:03 21 ensure adequate supplies of raw and refined sugar and it
16:18:07 22 uses something called the stocks-to-use ratio, if the
16:18:12 23 stocks-to-use ratio is between 13.5 percent and
16:18:17 24 15.5 percent, it lets the market work. So with respect to
16:18:21 25 the second mandate, the USDA, the stocks-to-use ratio speaks

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16:18:26 1 to the adequacy of the supply of sugar. If the
16:18:31 2 stocks-to-use ratio falls below 13.5 percent, that's an
16:18:35 3 indicator that the supply of sugar may not be adequate.

16:18:41 4 Q. Well, you didn't include the words "at reasonable
16:18:47 5 prices" in this slide that you presented just a couple of --
16:18:51 6 an hour ago, did you?

16:18:54 7 A. No, those word were not there.

16:18:57 8 Q. Let's take a look at the next slide. This is also
16:19:01 9 from Mr. Buterman's opening. This is the secretary of
16:19:04 10 the -- the acting secretary of the U.S. Department of
16:19:07 11 Agriculture, and you see that he writes, "please be assured
16:19:10 12 that the U.S. Department of Agriculture will work diligently
16:19:13 13 to represent the interests of all our stakeholders and
16:19:16 14 manage the program to provide adequate supplies of both raw
16:19:19 15 and refined sugar at reasonable prices." That's what he
16:19:22 16 wrote, correct?

16:19:25 17 A. I see that there.

16:19:31 18 Q. Now, during the government's questioning, you
16:19:34 19 testified that a company called CSC said it does not compete
16:19:37 20 with the merging parties, correct?

16:19:40 21 A. I referenced testimony from the founder and CEO of
16:19:43 22 CSC.

16:19:46 23 Q. And you presented a slide to the Court with an
16:19:49 24 excerpt from some testimony, correct, there it is?

16:19:52 25 A. Yes.

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16:19:57 1 Q. Okay. Did you read Mr. Farmer's entire deposition,
16:20:00 2 sir?

16:20:02 3 A. Yes, I believe so.

16:20:07 4 Q. So are you aware that Mr. Farmer testified "when we
16:20:10 5 offer sugar, we are not told by the buyer who the
16:20:14 6 competitors are, but to my knowledge, we have" -- and then
16:20:17 7 goes on, do you see that?

16:20:20 8 A. Yes.

16:20:21 9 Q. Okay. And so Mr. Farmer's testimony is we are not
16:20:24 10 told by the buyer who the competitors are, correct?

16:20:30 11 A. I see that.

16:20:31 12 Q. And US Sugar, US Sugar is not -- they actually don't
16:20:37 13 sell refined sugar, do they, you testified earlier that
16:20:40 14 United does?

16:20:40 15 A. I agree with that.

16:20:44 16 Q. Now, are you aware that Mr. Farmer testified that he
16:20:50 17 would rely on sales, his sales data to determine where CSC
16:20:57 18 had made sales of refined sugar in the United States?

16:21:01 19 A. Specifically I don't.

16:21:04 20 Q. You see it displayed on the screen sir, Mr. Farmer's
16:21:08 21 testimony?

16:21:09 22 A. Yes.

16:21:10 23 Q. All right. Let's take a look at what the sales data
16:21:14 24 shows. Were you aware that CSC makes sales of refined sugar
16:21:18 25 in 35 different states in the Continental United States,

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16:21:23 1 **sir?**

16:21:26 2 A. It doesn't surprise me. I wouldn't have said I was
16:21:30 3 aware of this specific map.

16:21:32 4 Q. And CSC makes sales in Tennessee and Virginia and
16:21:37 5 other states within both of the Department of Justice's
16:21:42 6 claimed markets, correct?

16:21:44 7 A. Yes, CSC has a market share in the markets that I
16:21:49 8 discussed earlier today.

16:21:50 9 Q. And I think the CSC market share, that I recall
16:21:54 10 seeing in the broader or what the DOJ called the southeast
16:21:59 11 market was six percent. Is that right?

16:22:02 12 A. That sounds right.

16:22:03 13 Q. Okay. Now CSC has a refinery in Virginia, correct?

16:22:10 14 A. Yeah. I want to be careful about using the word
16:22:18 15 refinery. CSC produces liquid sugar, and I don't recall all
16:22:23 16 the locations for CSC refineries. I don't have a reason to
16:22:29 17 dispute that.

16:22:30 18 Q. Why do you want to be careful about calling CSC a
16:22:34 19 refiner, sir?

16:22:35 20 A. The distinction between producing dry granulated
16:22:39 21 sugar and liquid sugar.

16:22:40 22 Q. Are you aware that the United States Department of
16:22:42 23 Agriculture calls CSC a refiner?

16:22:43 24 A. Well, this is where I just want to know how different
16:22:50 25 terms are being used, I want to be careful with these terms.

Rothman - cross

16:22:56 1 Q. I appreciate that response, you didn't answer my
16:22:59 2 question. Are you aware that the United States Department
16:23:03 3 of Agriculture characterizes CSC as a refinery?

16:23:07 4 A. I don't recall how the USDA characterizes CSC.

16:23:12 5 Q. Are you aware that CSC has to report data on its
16:23:18 6 supplies and sales to the USDA in the same way that say
16:23:25 7 Imperial does?

16:23:28 8 A. That wouldn't -- I'm not disputing that.

16:23:32 9 Q. Are you aware that CSC also has a refinery in
16:23:36 10 Tennessee?

16:23:41 11 A. I don't recall where CSC's locations are.

16:23:45 12 Q. Let's take a look at the next slide.

16:23:48 13 So I think this slide is supposed to show the
16:23:53 14 southeast market and also the so-called narrower market;
16:23:59 15 correct?

16:23:59 16 A. The terms we have been using are the narrower market
16:24:03 17 and the broader market.

16:24:05 18 Q. Well, I think I asked you in deposition, have you
16:24:07 19 ever used the terms narrower market and broader market in
16:24:11 20 defining a relevant market before, and you told me you had
16:24:15 21 not; correct?

16:24:16 22 A. I don't specifically recall that.

16:24:20 23 Q. And within this slide that you presented to the Court
16:24:23 24 a short while ago, you purported to list the locations of
16:24:25 25 refineries; correct?

Rothman - cross

16:24:34 1 A. This slide shows locations of refineries.

16:24:37 2 Q. But you didn't include the locations of any CSC
16:24:40 3 refineries, did you?

16:24:45 4 A. That's correct.

16:24:51 5 Q. Let's switch gears a little bit and talk about market
16:24:56 6 definition for a moment. Okay. In this case you're
16:25:02 7 offering the opinion that the two regions identified in the
16:25:05 8 government's complaint, are relevant geographic markets for
16:25:09 9 antitrust purposes; isn't that right?

16:25:12 10 A. Yes.

16:25:14 11 Q. But you didn't personally select the states to be
16:25:18 12 included within the claimed relevant geographic markets, did
16:25:23 13 you?

16:25:24 14 A. That's correct.

16:25:25 15 Q. You took what the Department of Justice had alleged
16:25:29 16 and then you analyzed that, correct?

16:25:34 17 A. Yes, I analyzed the markets that the United States
16:25:38 18 alleged.

16:25:39 19 Q. So you didn't identify the candidate markets
16:25:43 20 yourself, did you?

16:25:47 21 A. I evaluated the markets the United States alleged,
16:25:51 22 whether they were relevant antitrust markets for the
16:25:54 23 purposes of evaluating the competitive effects of the
16:25:57 24 proposed acquisition.

16:25:58 25 Q. I appreciate that, I think we already understand that

Rothman - cross

16:26:02 1 you analyzed what the Department of Justice alleged. My
16:26:06 2 question was different. You went through an example in
16:26:11 3 response to a question that Her Honor asked, do you recall
16:26:15 4 that?

16:26:16 5 A. Yes.

16:26:17 6 Q. And in that example, you said well, let's talk about
16:26:21 7 the sale of milk, and we'll identify a candidate market of
16:26:26 8 one block. Do you recall that?

16:26:27 9 A. Yes, I do.

16:26:28 10 Q. And then you said well we got to test it and then we
16:26:31 11 got to see if we need to go to two blocks or three blocks or
16:26:35 12 a larger geographic market. Do you recall that?

16:26:37 13 A. I do.

16:26:38 14 Q. Okay. In this case, you didn't identify the narrower
16:26:41 15 market, you didn't identify the candidate market, did you?

16:26:48 16 A. I didn't identify the narrower market, I would say as
16:26:51 17 part of evaluating whether the markets the United States has
16:26:57 18 alleged are relevant markets for the purpose of evaluating
16:27:01 19 the competitive effect, but part of that is evaluating
16:27:04 20 whether the candidate market that's implicit in the United
16:27:08 21 States's market is -- makes sense from a market definition
16:27:14 22 perspective.

16:27:15 23 Q. But you didn't identify the candidate market;
16:27:18 24 correct?

16:27:19 25 A. I evaluated the markets the United States has

Rothman - cross

16:27:24 1 alleged, and what's implicit in that is a candidate market,
16:27:28 2 it's included in my analysis.

16:27:30 3 Q. Well, you didn't identify it, you just accepted it,
16:27:33 4 correct?

16:27:35 5 A. I would say I evaluated it.

16:27:37 6 Q. And in your example, you said well, if you identify a
16:27:43 7 candidate market for milk and it's one block and then it
16:27:50 8 doesn't pass the hypothetical monopolist test, you got to go
16:27:54 9 broader, do you recall that?

16:27:56 10 A. Yes.

16:27:56 11 Q. And here your narrower market passes your
16:28:00 12 hypothetical monopolist test; correct?

16:28:04 13 A. It does.

16:28:04 14 Q. And your broader market passes your hypothetical
16:28:11 15 monopolist test correct?

16:28:12 16 A. It does pass the hypothetical monopolist test.

16:28:14 17 Q. And the merger guidelines say you're supposed to
16:28:17 18 focus on the smallest relevant market, is that true?

16:28:20 19 A. I don't think the merger guidelines say precisely
16:28:24 20 that.

16:28:26 21 Q. You didn't perform a hypothetical monopolist test on
16:28:29 22 any region that is smaller than the government's alleged
16:28:32 23 Georgia and surrounding states market, did you?

16:28:35 24 A. I did not.

16:28:38 25 Q. And you didn't perform a hypothetical monopolist test

Rothman - cross

16:28:43 1 on any region broader than the southeast market as alleged
16:28:47 2 by the United States, correct?

16:28:51 3 A. I evaluated the markets the United States has
16:28:56 4 alleged. Now a broader market, because the narrower and
16:29:00 5 broader market pass the hypothetical monopolist test, a
16:29:03 6 broader will also pass the hypothetical monopolist test.

16:29:06 7 Q. Right. You told me at deposition the entire United
16:29:09 8 States would pass your hypothetical monopolist test;
16:29:12 9 correct?

16:29:14 10 A. I think the same principle is the narrower, the
16:29:19 11 broader market pass hypothetical monopolist, broader markets
16:29:22 12 will also pass the hypothetical monopolist test.

16:29:24 13 Q. Sorry.

16:29:27 14 A. Sorry. I just want to be clear here that the
16:29:30 15 hypothetical monopolist test is one aspect, one part of
16:29:35 16 evaluating the relevant market. There is also the -- just
16:29:40 17 going back to the principles of market definition where, the
16:29:45 18 market definition is to help with the evaluation of
16:29:48 19 competitive effects. It's to help identify an area to focus
16:29:54 20 on in which there is potential for harm. Markets that pass
16:30:00 21 the hypothetical monopolist test aren't -- multiple markets
16:30:05 22 can pass the hypothetical monopolist test. That doesn't
16:30:08 23 mean that a national market is the relevant market for
16:30:14 24 evaluating competitive effects for the proposed transaction.

16:30:18 25 Q. We'll get to some more questions about that, sir, but

Rothman - cross

16:30:21 1 I want to focus for a moment on the hypothetical monopolist
16:30:24 2 test, because you have talked about it and explained the
16:30:27 3 concept to the Court. Let's be clear, the entire United
16:30:32 4 States would pass your hypothetical monopolist test;
16:30:36 5 correct?

16:30:36 6 A. Well --

16:30:38 7 Q. Can you answer that question, please, sir?

16:30:40 8 A. I think the entire United States would pass the
16:30:43 9 hypothetical monopolist test.

16:30:43 10 Q. The broader market plus Texas plus Illinois would
16:30:47 11 pass your hypothetical monopolist test; correct?

16:30:50 12 A. I think that's likely.

16:30:53 13 Q. A single plant within the narrower market where both
16:30:58 14 United and Imperial sell sugar would pass the hypothetical
16:31:03 15 monopolist test; correct?

16:31:07 16 A. Not necessarily. I'm not sure you're referring to a
16:31:10 17 single plant. I just want to be clear here. The markets
16:31:15 18 are defined around location of customers here, but not
16:31:20 19 necessarily.

16:31:20 20 Q. I'm talking about a customer's plant. I'm sorry if I
16:31:24 21 wasn't clear.

16:31:25 22 A. I'm sorry.

16:31:26 23 Q. You heard testimony -- you didn't hear testimony yet,
16:31:29 24 you heard in opening about Kraft's plant here in the State
16:31:32 25 of Delaware, correct?

Rothman - cross

16:31:35 1 A. Yes.

16:31:36 2 Q. Okay. Did you look, did you analyze in any way
16:31:40 3 whether that single Kraft plant in Dover, Delaware would
16:31:44 4 pass your hypothetical monopolist test?

16:31:47 5 A. Well, so I think that the question here is, I think
16:31:51 6 you're suggesting identifying a candidate market defined
16:31:56 7 around the location of where that plant is. And the
16:32:01 8 hypothetical monopolist test would ask whether the complete
16:32:03 9 elimination of competition to supply to that specific
16:32:08 10 geographic location would result in higher prices, and what
16:32:11 11 would potentially constrain that would be arbitrage,
16:32:18 12 purchasing the refined sugar outside of this market. And
16:32:21 13 that market may well be too narrow. It doesn't necessarily
16:32:24 14 pass the hypothetical monopolist test.

16:32:31 15 Q. I appreciate the answer, I don't think you answered
16:32:34 16 my question. Which is, did you test whether or not a single
16:32:38 17 plant within, a single customer plant within the broader
16:32:41 18 market, for instance, would pass your hypothetical
16:32:45 19 monopolist test?

16:32:47 20 A. So I didn't evaluate the hypothetical monopolist test
16:32:52 21 on any possible single location in the government's
16:32:57 22 geographic markets. I evaluated whether the government's
16:33:02 23 geographic markets were well-defined geographic markets.

16:33:06 24 Q. And you mentioned arbitrage a moment ago. Let's
16:33:10 25 explore that for a second. Okay. All right. One way that

Rothman - cross

16:33:14 1 a customer might engage in arbitrage is if the customer has
16:33:19 2 a facility outside of these alleged relevant markets;
16:33:24 3 correct?

16:33:26 4 A. In principle, yes.

16:33:30 5 Q. I think you concluded in your report that arbitrage
16:33:34 6 was unlikely for a variety of reasons including "most
16:33:40 7 customers do not have facilities in multiple regions."
16:33:44 8 That's in paragraph 95 of your opening report, if you want
16:33:46 9 to take a look. Do you recall that, sir?

16:33:48 10 A. Yes, this was part of the analysis.

16:33:50 11 Q. And are you aware of the testimony that's already
16:33:52 12 been elicited in this trial from, for example, General Mills
16:33:54 13 about the fact that it's got plants inside and outside of
16:34:00 14 the DOJ's claimed markets?

16:34:02 15 A. Yes, I am aware of that testimony.

16:34:04 16 Q. And you're aware that Mr. Riippa of General Mills
16:34:10 17 testified that because General Mills engages in bulk volume
16:34:12 18 contracts, General Mills has the ability to redirect supply
16:34:18 19 from say Iowa to Tennessee, do you recall that testimony,
16:34:20 20 sir?

16:34:22 21 A. Yes.

16:34:30 22 Q. Did you conduct any economic analysis to determine
16:34:32 23 whether purchasers like General Mills which have -- strike
16:34:38 24 that.

16:34:40 25 Did you conduct any economic analysis to analyze

Rothman - cross

16:34:47 1 how many purchasers are like General Mills and have
16:34:52 2 facilities inside and outside of the alleged relevant
16:34:56 3 markets?

16:34:59 4 A. So this was part of the analysis of my evaluation,
16:35:06 5 the hypothetical monopolist test, one possible form of
16:35:09 6 arbitrage would be for the customers that have facilities
16:35:14 7 outside the geographic market in principle, they could
16:35:18 8 purchase the refined sugars at their locations outside the
16:35:22 9 market and then reship the sugars to their locations in the
16:35:26 10 market, and I explained that most customers don't have
16:35:30 11 locations outside of the market, and even for the customers
16:35:34 12 that do have locations outside of the market this type of
16:35:38 13 arbitrage would be costly and inefficient. It would require
16:35:42 14 first, having the sugar shipped to their location outside of
16:35:46 15 the market, and then they would need to incur the cost of
16:35:50 16 receiving the sugar and then reshipping it back to their
16:35:54 17 location in the relevant market.

16:35:58 18 And what I explained is that this type of
16:36:02 19 arbitrage would not be sufficient to prevent prices from
16:36:06 20 going up as a consequence of the complete elimination of
16:36:10 21 competition to supply customers in the government's markets.

16:36:14 22 Q. So it's your testimony that most wholesale customers
16:36:18 23 of refined sugar in the alleged broader market do not have
16:36:22 24 locations both inside and outside the market, is that your
16:36:26 25 testimony?

Rothman - cross

16:36:29 1 A. Most --

16:36:30 2 Q. Yes or no, sir?

16:36:32 3 A. Yes.

16:36:33 4 Q. And do you disclose in your reports any analysis that
16:36:40 5 supports your contention that most customers do not have
16:36:45 6 plants inside and outside of the alleged relevant markets?

16:37:05 7 Instead of having you paw through your report,
16:37:08 8 sir, do you recall disclosing that here today?

16:37:10 9 A. I recall discussing it in my reports. I was looking
16:37:13 10 back to where it was discussed.

16:37:15 11 Q. You don't account for any arbitrage in your
16:37:27 12 hypothetical monopolist test, do you?

16:37:33 13 A. I wouldn't agree with that, I'm not sure I
16:37:36 14 understand.

16:37:36 15 Q. Your calculations factor in zero arbitrage, correct?

16:37:42 16 A. I wouldn't -- no, I don't agree that factors in zero
16:37:47 17 arbitrage, my analysis is that arbitrage would not be
16:37:51 18 sufficient to prevent price increases.

16:37:54 19 Q. Now, you are aware that defendant's expert,
16:38:00 20 Dr. Nicholas Hill has criticized the relevant markets that
16:38:03 21 the DOJ alleged and which you evaluated, correct?

16:38:10 22 A. Yes.

16:38:12 23 Q. And you're aware that Dr. Hill criticizes the
16:38:14 24 relevant markets for being too narrow, correct?

16:38:21 25 A. Yes.

Rothman - cross

16:38:22 1 Q. Dr. Hill's opinion is here on the screen, the
16:38:27 2 geographic markets are "arbitrarily selected and too
16:38:34 3 narrow", correct?

16:38:34 4 A. Yes, he makes that claim and I disagree with
16:38:37 5 Dr. Hill.

16:38:38 6 Q. And Dr. Hill proposes two potential alternative
16:38:48 7 markets correct?

16:38:49 8 A. He proposed two alternative markets, yes.

16:38:51 9 Q. And one is the competitive overlap region, correct?

16:38:54 10 A. Yes. Correct.

16:38:57 11 Q. You don't dispute that Dr. Hill's competitive overlap
16:39:01 12 region would pass your hypothetical monopolist test, do you?

16:39:05 13 A. No. And I think this goes back to what I was trying
16:39:09 14 to emphasize before, which is that the hypothetical
16:39:12 15 monopolist test evaluates whether a market is well defined,
16:39:15 16 whether it would be worth monopolizing as a part of the
16:39:19 17 market definition analysis, but it's not the only criteria.

16:39:21 18 Q. We'll come back to that in a moment.

16:39:24 19 The broader market that's alleged in the
16:39:28 20 complaint in which you took and evaluated, that completely
16:39:32 21 encompasses the so-called narrower market, correct?

16:39:41 22 A. If I understand your question correctly, the narrower
16:39:45 23 market is within the broader market?

16:39:47 24 Q. Correct.

16:39:49 25 A. Yes.

Rothman - cross

16:39:49 1 Q. And you don't contend and you're not offering an
16:39:54 2 opinion that the narrower market alleged in the complaint is
16:39:57 3 a superior geographic region for assessing the alleged
16:40:01 4 competitive effects of this merger than the broader area,
16:40:05 5 are you?

16:40:06 6 A. No, my opinion is that both of these markets are
16:40:10 7 properly defined and they're useful for the evaluation of
16:40:14 8 the competitive effects of the proposed acquisition.

16:40:17 9 Q. I asked you in deposition if the Court asked you to
16:40:21 10 choose between your two claimed relevant geographic markets
16:40:24 11 and you could choose only one, I asked you which one would
16:40:28 12 you choose, correct, do you recall that? And your answer in
16:40:31 13 deposition sir, was I haven't done that specific analysis;
16:40:34 14 correct?

16:40:38 15 A. That's correct. That's not -- it's an analysis I
16:40:42 16 didn't need to do, both of the markets the government has
16:40:45 17 defined are properly defined, well defined antitrust markets
16:40:49 18 for the purpose of evaluating the competitive effects of the
16:40:53 19 merger.

16:40:57 20 Q. You're not evaluating the opinion that Dr. Hill's
16:40:59 21 competitive overlap region is unhelpful for assessing the
16:41:03 22 potential anticompetitive effects of this merger, are you?

16:41:07 23 A. Well, my opinion is that it's too broad, that it --
16:41:11 24 it is too broad and it includes areas of, bringing in areas
16:41:15 25 in which the customers have meaningfully different choices,

Rothman - cross

and the consequence of that is that it can confuse rather than help clarify the analysis of competitive effect.

Q. I heard your explanation of that on direct. I appreciate that. You would agree that Dr. Hill's competitive overlap region is based on the principle of identifying states where United and Imperial compete today?

A. I'm not disputing that. I talked about this on direct, that it is not inconsistent with my criticism of this market, the relevant market does not need to include all of the areas in which the merging firms compete. Again, the purpose of market definition, using market definition to assist with the evaluation of competitive effects to help us identify where the focus where the potential for harm is likely to be the greatest.

Q. I think you said that Dr. Hill's competitive overlap region confuses things, because it brings in states where customers might have different competitive alternatives; is that right?

A. Right. For example I talked about how Dr. Hill's competitive overlap market includes Michigan and Ohio, which is what United refers to as the Michigan Sugar backyard. Michigan Sugar has three or four processing facilities there, it has a significant share of sales to customers in those states. The potential effect of the proposed acquisition for customers in those states is meaningfully

Rothman - cross

16:43:02 1 different from the potential effects of the proposed
16:43:04 2 transaction on customers in the United States geographic
16:43:07 3 markets. And combining these areas into the same market
16:43:12 4 serves to confuse rather than help clarify the potential
16:43:17 5 effects of the proposed acquisition.

16:43:19 6 Q. So it would be wrong in your view to include in the
16:43:22 7 relevant market customers that have different sets of
16:43:27 8 competitive alternatives, is that right? Yes or no?

16:43:34 9 A. Well --

16:43:35 10 Q. Yes or no?

16:43:36 11 A. I don't think this is a yes or no question.

16:43:38 12 Q. Well, please answer yes or no and then if you want to
16:43:41 13 explain, I'm sure Mr. Mincer will elicit some testimony on
16:43:44 14 the government's time. Can you answer my question yes or
16:43:48 15 no, please, sir?

16:43:51 16 A. Can you repeat the question?

16:43:52 17 Q. Sure.

16:43:53 18 Would it be wrong in your view to include in the
16:43:55 19 relevant market customers that have different sets of
16:43:58 20 competitive alternatives? Yes or no?

16:44:00 21 A. It's not a yes or no answer, it depends, more
16:44:02 22 information would be needed.

16:44:10 23 Q. One of the states that Dr. Hill includes in his
16:44:12 24 competitive overlap region is Pennsylvania; correct?

16:44:22 25 A. Yes.

Rothman - cross

16:44:23 1 Q. And Delaware is a state that is included in the
16:44:29 2 complaint's broader region; correct?

16:44:32 3 A. Yes, correct.

16:44:34 4 Q. You did do a analysis to determine whether the
16:44:38 5 competitive conditions for the sale of refined sugar are
16:44:41 6 different in Pennsylvania than they are in Delaware, didn't
16:44:43 7 you?

16:44:46 8 A. No, this was not an analysis I needed to do for
16:44:49 9 evaluating the government's market.

16:44:51 10 Q. And you don't dispute that both Imperial and United
16:44:55 11 compete for sales in Pennsylvania, do you?

16:44:59 12 A. No, I'm not disputing that.

16:45:01 13 Q. Dr. Rothman, let's take a look at another slide that
16:45:11 14 you used in your direct testimony. The geographic market
16:45:17 15 definition slide. Thank you.

16:45:18 16 Now, I think you focused much of your testimony
16:45:27 17 on the market shares that are listed on the right side of
16:45:34 18 this slide. Do you recall that?

16:45:36 19 A. I recall talking about the market shares on the right
16:45:39 20 and the left side.

16:45:42 21 Q. Now, LSR is not listed on the right side of this
16:45:44 22 slide, is it?

16:45:47 23 A. It's not. LSR shares are about seven percent of the
16:45:52 24 states shaded in red.

16:45:54 25 Q. LSR today is selling refined sugar into both the

Rothman - cross

16:46:00 1 narrower and by definition broader markets alleged by the
16:46:04 2 Department of Justice; correct?

16:46:06 3 A. Yes, that's correct.

16:46:08 4 Q. And is it your opinion that LSR would not try to take
16:46:13 5 advantage of a price increase that was limited to these two
16:46:19 6 claimed regions and try to sell more sugar into those
16:46:24 7 regions than it currently is today if there was indeed a
16:46:28 8 price increase, is that really your opinion, sir?

16:46:30 9 A. It's not my opinion that LSR won't do it at all. My
16:46:34 10 opinion is that this type of expansion that you're
16:46:38 11 describing would not be sufficient to prevent the harm from
16:46:41 12 the proposed acquisition.

16:46:45 13 Q. Now, the red shaded area or orange I can't really
16:47:00 14 tell which it is, but the so-called Clewiston, South Bay and
16:47:04 15 Imperial backyard, I think is the way it's been referred to,
16:47:09 16 that doesn't match the Department of Justice's alleged
16:47:12 17 southeast market, does it?

16:47:15 18 A. That's the -- what I have been referring to as the
16:47:18 19 narrower market. The broader market includes Mississippi,
16:47:22 20 Kentucky, West Virginia, Virginia, Maryland, Delaware, the
16:47:27 21 District of Columbia.

16:47:29 22 Q. You don't cite one ordinary course document from any
16:47:33 23 supplier or customer or from the USDA that matches the
16:47:37 24 southeast region alleged in the complaint, do you?

16:47:41 25 A. That matches the exact set of states in the broader

Rothman - cross

16:47:45 1 market.

16:47:45 2 Q. Correct?

16:47:46 3 A. I don't believe I cite a document that matches the
16:47:50 4 exact set of states. With respect to the narrower market,
16:47:56 5 this does come -- this is the same set of states as what
16:48:00 6 United refers to as the US Sugar, Imperial, and ASR
16:48:05 7 refineries' backyard.

16:48:07 8 Q. That's the one document in this case that matches
16:48:10 9 that claimed market, I agree with that.

16:48:12 10 Do you recall the testimony -- strike that.

16:48:14 11 Were you present for the testimony of
16:48:17 12 Mr. Sproull this morning?

16:48:21 13 A. Yes.

16:48:23 14 Q. Were you here for the sealed portion of that
16:48:26 15 testimony, sir?

16:48:29 16 A. I'm not -- we were-I was watching and sometimes when
16:48:32 17 the courtroom was sealed, I think we lost --

16:48:34 18 Q. Fair enough. But you reviewed Mr. Sproull's
16:48:37 19 deposition that I took?

16:48:40 20 A. Yes.

16:48:42 21 Q. And you recall that there is an ordinary course ASR
16:48:45 22 document that looks at the geographic regions very
16:48:48 23 differently than this document; correct?

16:48:51 24 A. The specifics of Mr. Sproull's deposition, I don't
16:49:04 25 recall, I mean I'm not disputing that there are documents

Rothman - cross

16:49:03 1 that refer to different combinations of states.

16:49:08 2 Q. You list purported market shares on the right side of
16:49:12 3 this slide from your direct testimony; correct?

16:49:15 4 A. Yes. Those are shares of sales of refined sugar to
16:49:20 5 customers in the Georgia and bordering states market.

16:49:27 6 Q. Okay. Those shares, just so we're clear, those are
16:49:30 7 based on an assumption that distributors and their sales
16:49:34 8 don't count; correct?

16:49:37 9 A. Well, I respectfully couldn't call it an assumption.
16:49:42 10 Distributors are not treated as market participants.

16:49:46 11 Q. Fair enough. You don't treat distributors as market
16:49:49 12 participants in this case, correct?

16:49:51 13 A. That's correct.

16:49:52 14 Q. Even though we saw the document in your direct
16:49:56 15 testimony in which a distributor is making -- is bidding for
16:50:01 16 the customer who testified this morning's business, correct?

16:50:05 17 A. That's correct. And I talked in my direct about the
16:50:10 18 distinction between at any given point in time being an
16:50:17 19 option, and whether the entity would be treated as a market
16:50:22 20 participant for the purposes of calculating market shares
16:50:26 21 for the purposes of evaluating competitive effects.

16:50:29 22 Q. So for all of your analysis in this case, you do not
16:50:33 23 treat distributors as market participants; is that right?

16:50:36 24 A. That's correct.

16:50:39 25 Q. Okay. Looking at the shares, for ASR as an example,

Rothman - cross

16:50:44 1 you attribute 25 percent of the sales in that region to ASR.

16:50:50 2 Do you know which ASR plants those sales come from?

16:50:55 3 A. In these -- I didn't break that down in these
16:50:59 4 calculations.

16:50:59 5 Q. You don't know that, you didn't analyze that, did
16:51:01 6 you?

16:51:02 7 A. Sitting here right now, I don't recall.

16:51:04 8 Q. You don't know how much of that claimed 25 percent
16:51:07 9 comes over from Louisiana, do you?

16:51:12 10 A. No, not sitting here.

16:51:13 11 Q. And you don't know how much of that claimed
16:51:16 12 25 percent comes down from Baltimore or down from Yonkers,
16:51:21 13 do you?

16:51:21 14 A. Not sitting here. Again, the numbers that -- the
16:51:25 15 point I was making with these calculations is different from
16:51:30 16 the specific issue, so I don't have those numbers in front
16:51:33 17 of me.

16:51:33 18 Q. For United, you don't know how much of the claimed
16:51:37 19 34 percent in market shares actually is beet sugar that's
16:51:42 20 coming all the way down from the Red River Valley, do you?

16:51:42 21 A. Same answer.

16:51:52 22 Q. Now, as I understand it, sir, the only relevant
16:52:00 23 product market that you're testifying in support of here
16:52:03 24 today is the production and sale of refined sugar to
16:52:06 25 wholesale customers; is that right?

Rothman - cross

16:52:09 1 A. Yes, that's correct.

16:52:11 2 Q. And I think you confirmed, but let me just do it
16:52:17 3 again. You don't believe that the sale of refined sugar by
16:52:20 4 someone that didn't produce it, that that sugar should count
16:52:24 5 in your relevant market calculations, correct?

16:52:32 6 A. I think I explained that including a purchaser in the
16:52:38 7 product market, the market, the production and sale of
16:52:43 8 refined sugar is a well-defined market but the markets not
16:52:47 9 the production and sale and resale of refined sugar.

16:52:51 10 As I explained, we talked about the hypothetical
16:52:55 11 monopolist test, that a market is well defined if it's a
16:53:01 12 market worth monopolizing, and that eliminating the
16:53:07 13 competition between all of the producers of refined sugar, a
16:53:12 14 purchaser in the product market wouldn't prevent that from
16:53:16 15 increasing prices.

16:53:17 16 Q. I'm glad you brought that up. You came up with an
16:53:21 17 example which was Nike and Adidas and Foot Locker, do you
16:53:26 18 recall that?

16:53:26 19 A. I used an analogy.

16:53:28 20 Q. It's the same one you used with me in deposition,
16:53:32 21 correct?

16:53:32 22 A. That sounds right.

16:53:32 23 Q. Okay. And what I asked you in deposition was, I
16:53:37 24 think exactly what the Judge asked you, that it involves a
16:53:40 25 differentiated product, doesn't it?

Rothman - cross

16:53:42 1 A. I don't recall you asking me that in deposition.

16:53:45 2 Q. But your analogy involves a differentiated product,
16:53:51 3 doesn't it?

16:53:51 4 A. I think it's fair to call Nike and Adidas a
16:53:57 5 differentiated product. Without going to the analogy, I
16:54:01 6 think the point that I'm making here is that if you
16:54:03 7 eliminate all competition between producers of refined
16:54:09 8 sugar, the question is whether that would result in an
16:54:11 9 increase in price, and an entity that is a purchaser in that
16:54:14 10 market wouldn't constrain that from increasing prices
16:54:21 11 because their prices would be going up as well.

16:54:23 12 Q. Now, sir, you agree with me that sugar is largely a
16:54:31 13 commodity product; correct?

16:54:34 14 A. The product itself?

16:54:37 15 Q. Yes.

16:54:38 16 A. Can be characterized as largely a commodity product.
16:54:41 17 That doesn't mean that competition to supply refined sugar
16:54:45 18 is what an economist could call homogeneous product
16:54:50 19 competition.

16:54:50 20 Q. You offered almost the same opinion in the Evonik
16:54:54 21 case, correct, you argued that hydrogen peroxide, even
16:54:58 22 though it's a commodity product, competition is
16:55:02 23 differentiated because suppliers are in different parts of
16:55:05 24 the country, that was your testimony in Evonik correct?

16:55:08 25 A. The principle you're identifying is similar in the

Rothman - cross

16:55:12 1 sense that the product itself is not highly differentiated,
16:55:15 2 but the competition is differentiated.

16:55:17 3 Q. And the court in Evonik rejected that opinion of
16:55:22 4 yours, correct?

16:55:22 5 A. The court disagreed with the FTC. I testified on
16:55:28 6 behalf of the FTC.

16:55:30 7 Q. Now, the product market that you proposed is also
16:55:35 8 based on sales to wholesale customers, correct?

16:55:40 9 A. The product market is defined as the production and
16:55:43 10 sale of refined sugar to wholesale customers.

16:55:46 11 Q. And your definition of wholesale customers ranges
16:55:50 12 from retailers to food service companies that might supply a
16:55:53 13 Dunkin Donuts to industrial companies like General Mills;
16:55:56 14 correct?

16:55:59 15 A. Those are wholesale customers.

16:56:02 16 Q. For purposes of your work in this case, did you
16:56:11 17 conduct any analysis to determine whether or not the
16:56:17 18 competitive conditions for sale to industrial customers are
16:56:23 19 the same as the competitive conditions for sale of refined
16:56:27 20 sugar to retail customers?

16:56:32 21 A. So my analysis considered all wholesale customers
16:56:37 22 together and I did not specifically differentiate between
16:56:42 23 sales to different types of whole sale customers in my
16:56:44 24 analysis.

16:56:45 25 Q. In your analysis, did you consider whether customers

Rothman - cross

16:56:51 1 that can receive refined sugar by bulk rail such as General
16:56:57 2 Mills have the same competitive alternatives as customers
16:57:01 3 that can only receive sugar by truck like Piedmont Candy
16:57:05 4 that we heard about earlier today?

16:57:09 5 A. My analysis was not that granular.

16:57:22 6 Q. Do you know how many wholesale customers there are
16:57:25 7 within the alleged southeast market?

16:57:29 8 A. The specific number, I don't know the exact number.

16:57:33 9 Q. Did you attempt to quantify all of that in your work
16:57:36 10 in this case?

16:57:39 11 A. You know, it would probably be in the data that I
16:57:43 12 worked with. I don't recall the specific number.

16:57:51 13 Q. Now, in your opening report, I think you wrote that
16:57:57 14 the Department of Justice's markets that you were evaluating
16:58:01 15 were logical because "refined sugar is costly to transport,
16:58:04 16 which means the geographic proximity to wholesale customers
16:58:10 17 matters," isn't that what you said in your opening report?

16:58:17 18 A. Yes, that's consistent with the math we were looking
16:58:19 19 at with the shares showing the shares of sales to customers
16:58:23 20 and the different geographic regions.

16:58:26 21 Q. I appreciate that answer. I think you really didn't
16:58:29 22 answer my question, which is, did you say in your opening
16:58:33 23 report, "refined sugar is costly to transport which means
16:58:36 24 that geographic proximity to wholesale customers matters"?

16:58:39 25 A. Yes.

Rothman - cross

16:58:40 1 Q. And you said a consequence of where United and
16:58:44 2 Imperial operate refineries is that they're both relatively
16:58:48 3 well situated to supply wholesale customers in the
16:58:51 4 Department of Justice's alleged markets; correct?

16:58:57 5 A. You didn't read exactly what that said, but it's
16:59:00 6 consistent with what I wrote.

16:59:02 7 Q. That was in paragraph 9 of your opening report,
16:59:06 8 correct?

16:59:07 9 A. I believe so.

16:59:08 10 Q. And you said all else -- this is in your opening
16:59:11 11 report, "all else equal, customers will tend to purchase
16:59:14 12 from suppliers that are closer to them that can supply at a
16:59:18 13 lower overall cost, and so competition can differ
16:59:21 14 geographically." Correct?

16:59:25 15 A. Yes.

16:59:26 16 Q. And that was the base -- one of the bases for your
16:59:30 17 contention that the Department of Justice's markets that
16:59:33 18 were alleged and that you were evaluating were logical,
16:59:37 19 correct?

16:59:38 20 A. This is part of the analysis.

16:59:42 21 Q. Then you submitted a reply report in this case on
16:59:45 22 March 24th; correct?

16:59:50 23 A. Yes.

16:59:51 24 Q. And the reply report, in the reply report -- strike
16:59:55 25 that.

Rothman - cross

16:59:57 1 Dr. Hill had submitted a report in between your
17:00:00 2 opening report and your reply report, correct?

17:00:03 3 A. Yes, that's correct.

17:00:04 4 Q. And Dr. Hill had taken your comments about how
17:00:08 5 geography matters and freight cost matters and he built an
17:00:12 6 economic model to test that, correct?

17:00:15 7 A. I wouldn't say that he had an economic model to test
17:00:19 8 anything.

17:00:19 9 Q. That's what Dr. Hill claims he did, correct?

17:00:21 10 A. He may claim that. I think Dr. Hill really
17:00:24 11 misinterpreted what I was saying about the importance of
17:00:31 12 geography and transportation cost.

17:00:31 13 Q. Let's see, in the opening report, geography and
17:00:41 14 transportation costs are everything, that's what makes the
17:00:44 15 Department of Justice's alleged markets logical.

17:00:47 16 Let's see what you said in your reply report.

17:00:49 17 A. I think you mischaracterized what I was saying in my
17:00:54 18 initial report.

17:00:54 19 Q. Sir, in your reply report you said a supplier with a
17:00:57 20 transportation cost disadvantage can exert competitive
17:01:02 21 pressure by offering a competitive price and earning a lower
17:01:05 22 margin. That's one of the things you said, correct?

17:01:07 23 A. I did, and that's not inconsistent with what we were
17:01:12 24 looking at from my initial report. I think you
17:01:15 25 mischaracterized what I said.

Rothman - cross

17:01:16 1 Q. You also said suppliers can exert competitive
17:01:20 2 pressure even if they do not have the lowest transportation
17:01:24 3 costs, that's what you said in the reply report?

17:01:26 4 A. Correct.

17:01:27 5 Q. You said there are many potential reasons why a
17:01:30 6 supplier might be willing and able to offer a competitive
17:01:33 7 bid that is unrelated to freight cost. Correct?

17:01:36 8 A. Yes, this is correct. I think what's relevant here
17:01:41 9 is that transportation costs matter, and that means
17:01:44 10 geography matters. And that's why competition is regional.
17:01:51 11 Now, within a region when you have suppliers that are well
17:01:54 12 situated to supply customers, that's not to say that the
17:02:01 13 only thing that matters is transportation costs, suppliers
17:02:04 14 find other ways to impose competitive pressure on each
17:02:11 15 other. This is what I was -- what I meant when I said
17:02:14 16 Dr. Hill misinterpreted what I was saying, and his models
17:02:21 17 are just, they're not addressing what I was saying.

17:02:24 18 Q. In fact, I think you calculated that for 89 percent
17:02:31 19 of the customers that United supplied, United does not have
17:02:34 20 the lowest transportation cost.

17:02:41 21 A. Correct. In Dr. Hill's analysis that's correct.
17:02:44 22 There is nothing inconsistent here with on the one hand
17:02:51 23 geography being an important component of competition and
17:02:54 24 suppliers finding ways to impose competitive pressure on
17:02:57 25 each other and to win business even when they are not the

Rothman - cross

17:03:02 1 closest in terms of transportation.

17:03:05 2 Q. Let's switch gears and talk for a moment about the
17:03:08 3 market concentration calculations you performed. When you
17:03:12 4 testified earlier about a presumption of harm to
17:03:16 5 competition, that presumption was based on your calculation
17:03:18 6 of market concentration, correct?

17:03:25 7 A. Yes. The testimony on the presumption of harm was
17:03:28 8 based on the calculation of -- I also referred to
17:03:36 9 concentration calculations and exchanges of concentration to
17:03:38 10 markets and included additional states.

17:03:41 11 Q. The geographic regions were to be -- that were being
17:03:45 12 studied were adjusted so the market share and concentration
17:03:48 13 calculations would change, correct?

17:03:52 14 A. That's likely, yeah.

17:04:00 15 Q. And just to confirm, the market share and
17:04:05 16 concentration calculations don't include suppliers, correct,
17:04:11 17 distributors, correct?

17:04:13 18 A. The measures of market concentration are based on
17:04:17 19 shares. Shares are based on sales of market participants as
17:04:22 20 I've explained, distributors should not be treated as market
17:04:26 21 participants for competitive effects analysis.

17:04:28 22 Q. Are you aware that Section 5.1 of the Department of
17:04:32 23 Justice's own Horizontal Merger Guidelines say that all
17:04:36 24 firms that currently own revenues in the relevant market are
17:04:40 25 considered market participants?

Rothman - cross

17:04:41 1 A. There is -- that's the opening statement, I think
17:04:44 2 that that's taking it out of context with the guidelines are
17:04:49 3 saying with respect to the identification of market
17:04:52 4 participants, the guidelines don't just say that.

17:04:57 5 Q. Now, the market shares and the concentrations that
17:05:00 6 you relied on to support your opinion that the merger will
17:05:05 7 lead to a presumption of harm to competition are based on
17:05:09 8 2021 sales, correct?

17:05:11 9 A. In my reply report, I updated everything to 2021 data
17:05:15 10 because the data had become available.

17:05:17 11 Q. So your concentration calculations, your market
17:05:20 12 shares, they're all based upon 2021 data, correct?

17:05:23 13 A. In the reply report, they are. In the first report
17:05:27 14 they were based on 2020 data.

17:05:29 15 Q. Fair enough. But the reply report, those are the
17:05:31 16 concentration calculations that you're presenting in your
17:05:34 17 opinions here today; correct?

17:05:36 18 A. Yes, that's correct.

17:05:38 19 Q. Okay. As I understand it, that testimony is based on
17:05:42 20 a snapshot in time, 2021, correct?

17:05:44 21 A. It's based on 2021 data, yeah, that's correct.

17:05:52 22 Q. So you're not making any kind of predictions or
17:05:55 23 assumptions about what will happen in later years with
17:05:58 24 respect to, for example, NSM's share; correct?

17:06:00 25 A. The market shares and the market concentration

Rothman - cross

17:06:09 1 numbers are based on 2021 data, that's the most recent data
17:06:12 2 available.

17:06:12 3 Q. And you see that NSM has grown its sales within the
17:06:17 4 broader market from one percent to three percent from 2019
17:06:20 5 to 2021, sir, correct. Do you see that?

17:06:29 6 A. Yes. Imperial's sales went from 14 percent to
17:06:35 7 17 percent.

17:06:35 8 Q. Well, Imperial's sales went up from 14 to 17 percent
17:06:39 9 because there was a force majeure, there was a beet freeze,
17:06:43 10 correct?

17:06:43 11 A. There was a beet freeze. Imperial's share went up
17:06:46 12 from 14 percent to 17 percent.

17:06:48 13 Q. Let's get back to my question which you didn't
17:06:52 14 answer, sir.

17:06:52 15 From 2019 to 2021, NSM's share increased three
17:06:57 16 fold from one percent to three percent; correct? Actually
17:07:00 17 it's more than that.

17:07:02 18 A. It went from one percent to three percent between
17:07:06 19 2018 and 2021.

17:07:07 20 Q. And in your market share calculations, you're
17:07:10 21 assuming that NSM stays at three percent, correct?

17:07:14 22 A. The market share calculations are using 2021 data for
17:07:18 23 everybody.

17:07:18 24 Q. And so the answer to my question is you're right, the
17:07:22 25 market share calculations assume no further growth by NSM,

Rothman - cross

17:07:26 1 correct?

17:07:29 2 A. That's correct, the market share calculations don't
17:07:33 3 invent assumptions about what everybody's shares are going
17:07:36 4 to do over time.

17:07:37 5 Q. And CSC shares are static even though its shares have
17:07:42 6 grown from three percent to six percent from 2018 to 2021,
17:07:46 7 correct?

17:07:46 8 A. The market shares and market concentration numbers
17:07:49 9 use the numbers from 2021.

17:07:51 10 Q. Now, when calculating market shares in this case, you
17:07:55 11 grouped together sales of sugar produced by each of United's
17:08:00 12 four members; correct?

17:08:03 13 A. I calculated United's share.

17:08:07 14 Q. And in all of your work in this case, you never
17:08:10 15 separately analyzed sales of sugar, that US Sugar had
17:08:17 16 produced, correct?

17:08:19 17 A. No, that wouldn't have been -- that wouldn't have
17:08:22 18 made sense.

17:08:28 19 Q. Now, you agree that US Sugar is the company that's
17:08:31 20 attempting to acquire Imperial; correct?

17:08:35 21 A. Yes, correct.

17:08:39 22 Q. Your analysis in this case assumes that post
17:08:42 23 transaction, United will market all of the sugar that
17:08:45 24 Imperial produces; correct?

17:08:49 25 A. Yes, my understanding is that post transaction,

Rothman - cross

17:08:53 1 United would sell the sugar that's produced at Imperial's
17:08:57 2 Port Wentworth refinery.

17:08:58 3 Q. And you understand that for the sugar that United
17:09:02 4 markets, United is the company that negotiates and
17:09:05 5 determines the prices it will charge for refined sugar,
17:09:08 6 right?

17:09:10 7 A. Yes.

17:09:17 8 Q. You agree that US Sugar has no control over the
17:09:20 9 prices that are charged for its sugar, correct?

17:09:25 10 A. Yes, that's my -- United is the marketing entity of
17:09:31 11 its four member owners, its four member owners don't set
17:09:35 12 prices, they don't compete on price, they operate as one
17:09:38 13 economic unit and that's United.

17:09:40 14 Q. And you told me at deposition that you're not aware
17:09:43 15 of a single document in this case indicating that the
17:09:45 16 purpose of this transaction in US Sugar's acquisition of
17:09:51 17 Imperial is to raise prices, isn't that right?

17:09:55 18 A. I recall that.

17:09:58 19 Q. And you would agree with me, don't you, that United
17:10:00 20 does not produce any refined sugar itself?

17:10:02 21 A. I agree with that.

17:10:02 22 Q. And you're not offering an opinion, are you, that
17:10:10 23 United has control over the amount of sugar produced by US
17:10:14 24 Sugar or any other member -- any of its other members;
17:10:18 25 correct?

Rothman - cross

17:10:19 1 A. I'm not offering that opinion.

17:10:21 2 Q. And you're not offering an opinion that United has
17:10:26 3 the ability to tell US Sugar to stop producing refined sugar
17:10:31 4 or to produce less refined sugar, right?

17:10:34 5 A. I'm not offering that specific opinion.

17:10:36 6 Q. And you're not offering an opinion that each of
17:10:40 7 United's member owners can independently choose their own
17:10:47 8 output, correct?

17:10:48 9 A. I'm sorry, can you repeat that question?

17:10:50 10 Q. Sure. You're not offering an opinion that United's
17:10:53 11 owner members can each choose their own output
17:10:56 12 independently, are you?

17:10:59 13 A. I'm not offering an opinion that they can't.

17:11:02 14 Q. Because they each can -- let's clarify that.

17:11:05 15 You're not offering an opinion in this case that
17:11:13 16 United's member owners have any limitations imposed by
17:11:16 17 United on their ability to choose their own output, are you?

17:11:23 18 A. I haven't offered that opinion, no.

17:11:25 19 Q. You're aware, aren't you, that US Sugar stated that
17:11:28 20 one of the reasons it wants to complete this transaction is
17:11:31 21 to increase the output of refined sugar at Imperial 's
17:11:34 22 refinery in Savannah?

17:11:37 23 A. Yes, I am aware of that aspiration.

17:11:40 24 Q. And did you hear Mr. Wineinger's testimony earlier
17:11:43 25 today, that he views this mandate to be able to sell all of

Rothman - cross

17:11:52 1 the refined sugar that its members produce?

17:11:55 2 A. What I heard was that his mandate is to sell the
17:11:59 3 refined sugar, as much refined sugar at the highest possible
17:12:05 4 net selling price.

17:12:06 5 Q. That's fair?

17:12:06 6 A. Which to me is consistent with trying to make the
17:12:10 7 most profit for United's member owners, which is both trying
17:12:15 8 to sell as much sugar at the highest possible net selling
17:12:19 9 price.

17:12:19 10 Q. But you heard his testimony where he was recounting
17:12:21 11 an example where he hadn't been able to sell it all. The
17:12:24 12 cost of carrying the sugar to next year both in terms of the
17:12:30 13 cost of storage and also the cost in terms of the reduced
17:12:33 14 sales in the following year, correct?

17:12:35 15 A. Yes, correct. That example was consistent with an
17:12:38 16 objective of trying to sell the most refined sugar at the
17:12:41 17 highest possible net selling price to try to maximize profit
17:12:44 18 for the member owners.

17:12:48 19 Q. You wrote in your reply report, didn't you, that
17:12:51 20 higher prices from the proposed transaction would result in
17:12:54 21 a decrease in the quantity sold in the relevant markets.
17:12:57 22 That's entered in your reply report, correct?

17:13:00 23 A. Higher prices in general could result in a reduction
17:13:03 24 in quantities sold. Here the quantities sold of refined
17:13:10 25 sugar are not that sensitive to price, but quantities and

Rothman - cross

17:13:18 1 prices are related.

17:13:20 2 Q. What you wrote in your report was higher prices from
17:13:23 3 the proposed transaction would result in a decrease in the
17:13:26 4 quantity sold in the relevant markets. That's what you
17:13:29 5 wrote in your reply report, correct?

17:13:31 6 A. Yes, I wrote that, we're taking this out of context.
17:13:36 7 I wrote that, yes.

17:13:37 8 Q. And you also wrote, United and Imperial increasing
17:13:41 9 prices would decrease the quantity that they sell and would
17:13:44 10 increase the residual demands of other sellers, correct?

17:13:49 11 A. Yes.

17:13:51 12 Q. You're not aware -- strike that.

17:13:53 13 You told me in deposition that you're not aware
17:13:56 14 of any evidence in this case stating that the purpose of
17:13:59 15 this transaction is to decrease output in any way, correct?

17:14:05 16 A. Correct.

17:14:06 17 Q. In fact, you have seen evidence that the purpose of
17:14:09 18 the transaction, as at least you called it, an aspiration in
17:14:13 19 your deposition, was for US Sugar to increase output at Port
17:14:16 20 Wentworth, correct?

17:14:19 21 A. I am aware of that aspiration.

17:14:22 22 Q. Now, you recognize, sir, that several of the sellers
17:14:30 23 of refined sugar in the United States are organized as
17:14:34 24 agricultural cooperatives, correct?

17:14:40 25 A. Yes.

Rothman - cross

17:14:41 1 Q. And that means that many of the sellers of refined
17:14:43 2 sugar in this country are actually owned by the farmers of
17:14:47 3 sugarcane and sugar beets. You don't dispute that, do you?

17:14:51 4 A. No, I don't dispute that.

17:14:53 5 Q. And you're familiar with not just the testimony from
17:14:56 6 Mr. Wineinger, but also, for example, from the CEO of
17:15:00 7 Michigan and NSM that agricultural cooperatives view their
17:15:04 8 mandate as selling all of the products supplied by the
17:15:09 9 members of the cooperative, you're aware of that, correct?

17:15:13 10 A. I don't recall the specific testimony. I think that
17:15:19 11 -- understand that those words are used, for example, with
17:15:21 12 United, sell it all, but it's also sell it high and I think
17:15:26 13 that the real objective is to make the most profit for the
17:15:29 14 member owners, which involves both selling as much as
17:15:33 15 possible at the highest possible prices.

17:15:35 16 Q. Now, just to confirm, you never offered an expert
17:15:39 17 opinion before in a case involving an agricultural
17:15:41 18 cooperative, correct?

17:15:42 19 A. That's correct.

17:15:43 20 Q. I think in your testimony earlier today, you went
17:15:48 21 through some, I believe what you called market conditions,
17:15:51 22 that you believe make the refined sugar industry in the
17:15:52 23 United States more conducive to coordinated interaction, do
17:16:00 24 you recall that?

17:16:02 25 A. Yes, vulnerable to coordinated interaction.

Rothman - cross

17:16:04 1 Q. I think you put up a slide which had an e-mail from
17:16:07 2 Mr. Speece who testified earlier today, do you recall that?

17:16:11 3 A. Yes.

17:16:12 4 Q. And I think that -- did you hear Mr. Speece's
17:16:18 5 testimony that what he meant by "signal the market" meant
17:16:23 6 signaling customers?

17:16:24 7 A. I did hear him say that.

17:16:27 8 Q. And you testified in the Evonik case on behalf of the
17:16:38 9 Federal Trade Commission, correct?

17:16:39 10 A. Yes, that's correct.

17:16:40 11 Q. And you offered the opinion in that case that the
17:16:43 12 market for hydrogen peroxide was vulnerable to coordination,
17:16:49 13 correct?

17:16:49 14 A. Yes, that's correct.

17:16:50 15 Q. And in Evonik, the court rejected the Federal Trade
17:16:57 16 Commission's request for injunction, correct?

17:16:59 17 A. The court disagreed with the FTC, yes.

17:17:04 18 Q. And the court disagreed with your opinion that the
17:17:08 19 market was vulnerable to coordination, correct?

17:17:13 20 A. I believe that's correct.

17:17:14 21 Q. And the Evonik court walked through a bunch of
17:17:19 22 factors that it relied on to ultimately find that the market
17:17:22 23 was not vulnerable to coordination, isn't that true?

17:17:27 24 A. The Evonik court disagreed about whether the market
17:17:30 25 was vulnerable to coordination.

Rothman - cross

17:17:32 1 Q. One of the factors the Evonik court pointed to was
17:17:37 2 the presence of sophisticated and powerful customers, right?

17:17:40 3 A. That sounds right.

17:17:42 4 Q. And you heard testimony from General Mills and other
17:17:46 5 companies in this case, correct?

17:17:49 6 A. Yes.

17:17:50 7 Q. And another factor that the Evonik court pointed to
17:17:57 8 that indicated that a market, the market in that case was
17:18:01 9 not vulnerable to the coordination was the presence and use
17:18:05 10 of large and long-term contracts; correct?

17:18:08 11 A. That sounds right.

17:18:09 12 Q. And you don't dispute that the majority of refined
17:18:13 13 sugar sold in the United States is sold pursuant to
17:18:17 14 long-term contracts, do you?

17:18:21 15 A. It depends what you mean by long-term, but most
17:18:24 16 refined sugar is sold pursuant to contracts.

17:18:27 17 Q. Well, we heard testimony from General Mills that it
17:18:31 18 contracts a year at a time, it does so in advance of the
17:18:35 19 year; correct?

17:18:38 20 A. Yes.

17:18:39 21 Q. Okay. And another factor that the Evonik court
17:18:42 22 pointed to indicating that the market there was not
17:18:45 23 vulnerable to coordinated interaction, was the use of blind
17:18:48 24 bidding. Do you recall that?

17:18:50 25 A. Yes.

Rothman - cross

17:18:51 1 Q. And you agree with me, don't you, that customers like
17:18:55 2 General Mills and Kraft and others use blind bidding, RFP
17:19:00 3 processes?

17:19:01 4 A. I agree that RFP processes are used in the refined
17:19:07 5 sugar industry.

17:19:08 6 Q. In your demonstratives I think you also pointed to
17:19:12 7 some e-mails involving Mr. Wistisen. Do you recall that?

17:19:17 8 A. Yes.

17:19:18 9 Q. And I think in your demonstratives you had two sets
17:19:21 10 of e-mails, one on September 21st of 2020, do you recall
17:19:24 11 that?

17:19:27 12 A. Yes, I -- September 2020, yes.

17:19:30 13 Q. And you didn't conduct any Imperial analysis of
17:19:34 14 prices before or after those e-mails of September 21st of
17:19:40 15 2020, did you?

17:19:40 16 A. No, I'm not sure what that analysis would be, but I
17:19:44 17 -- no, the interaction that I talked about was as an example
17:19:51 18 of the information sharing.

17:19:55 19 Q. Well, you didn't conduct any empirical analysis to
17:19:58 20 see if prices rose after September 21st ever 2020, did you?

17:20:00 21 A. No, I didn't conduct a specific analysis of that.

17:20:00 22 Q. And the same is true for the e-mail you pointed to on
17:20:10 23 November 21, 2020, you didn't conduct any empirical analysis
17:20:18 24 of prices before and after that e-mail, did you?

17:20:22 25 A. No. These examples are making a different point.

Rothman - cross

17:20:35 1 Q. Now, I think you testified in your calculation of
17:20:37 2 whether the coordinations would be profitable, you assumed
17:20:41 3 that United and ASR would coordinate on 10, 20, 30, or
17:20:46 4 40 percent of opportunity, is that right?

17:20:48 5 A. I considered scenarios in which the extent of
17:20:52 6 coordinated interaction would be increased by different
17:20:57 7 increments and I reported the price effects across all of
17:21:01 8 the scenarios.

17:21:02 9 Q. So those are just assumptions that you were using in
17:21:07 10 your analysis, correct?

17:21:08 11 A. I would call them scenarios. They provide
17:21:11 12 information about the range of potential price effect.

17:21:15 13 Q. Now, let's take a look at a slide you presented in
17:21:21 14 your summary of opinions. Sir, you presented a slide and
17:21:31 15 went through it with the Court, correct?

17:21:31 16 A. Yes, that's correct.

17:21:37 17 Q. And you're expressing things, expressing alleged harm
17:21:43 18 in dollars here; correct?

17:21:45 19 A. Yes, that's correct.

17:21:46 20 Q. And on a percentage basis, the claimed price effect
17:21:52 21 in the narrower market is 3.6 percent, correct?

17:21:57 22 A. So are you talking about the weighted average.

17:22:00 23 Q. The weighted average, correct?

17:22:02 24 A. The exact number is three point something percent.

17:22:05 25 Q. Figure 9 on page 44 of your reply report. And you

Rothman - cross

17:22:12 1 presented it in court just a short while ago, sir?

17:22:14 2 A. Yeah, I haven't memorized all the numbers and all of
17:22:18 3 the slides.

17:22:19 4 Q. The weighted average in the narrower market was
17:22:27 5 around 3.6 percent, correct? Is that right, sir?

17:22:34 6 A. I'm looking. Figure 9. That's correct.

17:22:39 7 Q. Okay. And in your -- in the broader market, the
17:22:43 8 predicted price effect according to your model is
17:22:47 9 3.3 percent; correct?

17:22:49 10 A. So these are both the Predicted Price Effects or just
17:22:53 11 the elimination of head-to-head competition, 3.6 in the
17:22:57 12 narrower market and 3.3 percent in the broader market.

17:23:01 13 Q. And those estimates are based upon the Department of
17:23:07 14 Justice's claimed product market; correct?

17:23:11 15 A. Those are the estimates of price effects on harm in
17:23:16 16 the United States's markets.

17:23:18 17 Q. So the estimates are dependent upon the court
17:23:22 18 accepting the United States' product and geographic markets,
17:23:26 19 correct.

17:23:28 20 A. The estimates are to customers in the United States's
17:23:32 21 markets.

17:23:34 22 Q. And these estimates are based upon your so-called
17:23:38 23 second-score bidding model, right?

17:23:40 24 A. These are based on a model that's called a second
17:23:44 25 score.

Rothman - cross

17:23:45 1 Q. In your reply report you also presented evidence
17:23:49 2 using what you call a GUPPI model, correct?

17:23:52 3 A. Yes, that's correct.

17:23:54 4 Q. And you admitted in deposition that if companies are
17:23:59 5 competing at all and making any profits a GUPPI will also
17:24:03 6 predict some upward pricing pressure; correct?

17:24:07 7 A. Yes, that's correct.

17:24:09 8 Q. And in the GUPPI models in your reply report, the
17:24:13 9 highest predicted price effect was 3.2 percent, correct on
17:24:25 10 the weighted average basis, sir. Table 8, sir.

17:24:41 11 A. Yes, that's correct.

17:24:49 12 Q. And the lowest predicted price effect there is
17:24:53 13 1.4 percent, correct?

17:25:01 14 A. Yes, in Table 8, yes.

17:25:03 15 Q. Let's talk about your GUPPI a bit more for a moment.
17:25:08 16 Your GUPPI went down by fifty percent from your opening
17:25:12 17 report to your reply report; correct, the predicted price
17:25:16 18 effect?

17:25:19 19 A. The predicted price, I talked about this in direct.

17:25:19 20 Q. You submitted an opening report in this case on
17:25:22 21 February 28th, isn't that true?

17:25:24 22 A. Yes, that's correct.

17:25:25 23 Q. Four days later you submitted a corrected report?

17:25:29 24 A. Yes, that's correct.

17:25:30 25 Q. Among the corrections was a correction to

Rothman - cross

17:25:33 1 paragraph 12 of your February 28th report where you called
17:25:36 2 the DOJ's markets highly concentrated today; correct?

17:25:42 3 A. Yes. This was the text where I had intended to write
17:25:48 4 that post transaction the DOJ's markets would be highly
17:25:52 5 concentrated.

17:25:53 6 Q. What you wrote and what you had to correct is that
17:25:56 7 the markets are highly concentrated today, correct?

17:25:59 8 A. Yes, that's correct.

17:26:00 9 Q. So you corrected it in a corrected report submitted
17:26:03 10 on March 4th, correct?

17:26:04 11 A. Yes, that's correct.

17:26:05 12 Q. And then in your March 4th report, you had predicted
17:26:10 13 price effects using a GUPPI model, correct?

17:26:12 14 A. Yes, that's correct.

17:26:13 15 Q. And you got the GUPPI formula wrong in that report,
17:26:17 16 correct?

17:26:18 17 A. Yes, I referred to this earlier, I flipped the price
17:26:23 18 ratio and that increased one predicted price effect and
17:26:27 19 decreased another.

17:26:29 20 Q. And the court in Evonik found your GUPPI analysis was
17:26:32 21 unreliable, correct?

17:26:35 22 A. The court disagreed with the GUPPI analysis.

17:26:40 23 Q. And the Evonik court is not the only court to
17:26:43 24 disagree with your attempt to provide economic testimony;
17:26:47 25 correct?

Rothman - cross

17:26:50 1 A. Other courts have disagreed with analysis I have
17:26:54 2 done.

17:26:54 3 Q. Your opinions were -- your HHI calculations were
17:27:00 4 called or criticized in Altria and JUUL Labs by the judge
17:27:06 5 there, correct?

17:27:08 6 A. Yes, the judge disagreed with the calculation I did.

17:27:12 7 Q. And you provided testimony in the Aya Healthcare case
17:27:16 8 as well, correct?

17:27:19 9 A. Yes, correct.

17:27:20 10 Q. And your opinions were found unreliable by the Aya
17:27:28 11 Healthcare case court, correct?

17:27:30 12 A. I think there is some context there, but there is a
17:27:33 13 statement by the judge to that effect.

17:27:36 14 MR. YATES: Your Honor, Mr. Marriott on behalf
17:27:38 15 of Imperial would like to ask just a few minutes of
17:27:41 16 questions.

17:27:51 17 MR. MARRIOTT: Good afternoon, Your Honor.
17:27:54 18 David Marriott for LDC and Imperial. May I proceed?

17:27:54 19 THE COURT: Please.

17:27:59 20 BY MR. MARRIOTT:

17:27:59 21 Q. Good afternoon, Dr. Rothman.

17:28:01 22 A. Good afternoon.

17:28:02 23 Q. I would like to ask you some questions about the
17:28:04 24 government's proposed markets as they relate to Imperial's
17:28:05 25 business. Why don't we look together if we could at a map,

Rothman - cross

17:28:12 1 a demonstrative, DDX 4. Do you see that, sir?

17:28:18 2 A. Yes.

17:28:20 3 Q. And the government's narrower alleged market is
17:28:24 4 depicted in blue and it's broader alleged market is depicted
17:28:30 5 in red. Do you see that, sir?

17:28:33 6 A. Yes.

17:28:34 7 Q. And the government's alleged markets exclude states
17:28:38 8 in which Imperial markets refined sugar; correct?

17:28:44 9 A. Yes, that's correct.

17:28:45 10 Q. And so, for example, Imperial markets refined sugar
17:28:48 11 in Illinois, Indiana, Ohio and Pennsylvania, correct?

17:28:55 12 A. Yes, I discussed this on direct.

17:28:58 13 Q. And Imperial not only markets outside the
17:29:01 14 government's alleged markets but it also sells significant
17:29:04 15 quantities of sugar outside the government's alleged
17:29:09 16 markets; true?

17:29:09 17 A. It sells refined sugar outside of the markets.

17:29:13 18 Q. In fact in 2021, 47 percent of Imperial's sales were
17:29:18 19 outside of the government's narrower market, and 33 percent
17:29:22 20 of Imperial's sales were outside of the government's broader
17:29:27 21 market, correct?

17:29:28 22 A. I haven't -- I don't recall that. I haven't done
17:29:30 23 that calculation.

17:29:31 24 Q. That's not a calculation that you did in connection
17:29:32 25 with submitting your opinions in this case, correct?

Rothman - cross

17:29:36 1 A. Well, I'm not disputing the number. I explained
17:29:41 2 earlier that the relevant market need not include all of the
17:29:45 3 areas in which there is a potential for harm from a
17:29:48 4 transaction.

17:29:49 5 Q. But you don't dispute that in 2021, 47 percent of
17:29:52 6 Imperial's sales were outside of the government's narrower
17:29:56 7 market; true?

17:29:57 8 A. I'm not disputing that.

17:29:59 9 Q. I want to add if I could, Dr. Rothman, to our slides
17:30:05 10 figures and these come from DTX 516 which is in evidence
17:30:08 11 representing Imperial's 2021 sales by state. Do you see
17:30:12 12 that, sir?

17:30:17 13 A. I see what's on the screen.

17:30:20 14 Q. That is what I am referring to.

17:30:22 15 A. Okay.

17:30:22 16 Q. And Imperial had more sales in some of the states
17:30:25 17 that are outside of the government's alleged markets than it
17:30:28 18 did in some of the states that are inside the government's
17:30:32 19 alleged markets; correct?

17:30:35 20 A. Correct. So, for example, Texas is a much, much
17:30:40 21 bigger state than West Virginia, it's not surprising that it
17:30:42 22 would have more sales in Texas than in West Virginia.

17:30:42 23 Q. I'm glad you raised Texas, Dr. Rothman. In fact,
17:30:52 24 Imperial had more sales in Texas than it did in all but two
17:30:52 25 of the thirteen states which are included in the

Rothman - cross

17:30:59 1 government's alleged markets, isn't that right?

17:31:01 2 A. Yeah, Texas is a big state. I think the distinction
17:31:06 3 here that's relevant is when we're thinking about potential
17:31:11 4 effects of a transaction, in Texas we're thinking about what
17:31:14 5 are the options that they have, and that's in terms of the
17:31:17 6 more relevant metric there would be Imperial's share of
17:31:21 7 sales to customers in Texas. The eleven percent number is a
17:31:25 8 big number because there are a lot of people in Texas.

17:31:28 9 Q. And the government's broader market, Dr. Rothman, it
17:31:32 10 excludes three of Imperial's ten largest states by volume,
17:31:37 11 isn't that right, Indiana, Ohio and Pennsylvania, do you see
17:31:42 12 those there in blue?

17:31:43 13 A. I agree that those states are not included in the
17:31:45 14 government's market.

17:31:47 15 Q. And Imperial had more sales, in fact, sir, in each of
17:31:51 16 Indiana, Ohio and Pennsylvania than it did in Mississippi,
17:31:57 17 Maryland, Delaware, and DC combined, isn't that right, sir?

17:32:03 18 A. I haven't done the math. I'm not disputing that.
17:32:09 19 It's not relevant to the analysis of geographic market.

17:32:13 20 Q. Imperial competes with producers located both outside
17:32:18 21 the -- withdrawn.

17:32:20 22 Imperial competes with producers located outside
17:32:23 23 of the government's proposed market, you agree with that, do
17:32:27 24 you not?

17:32:27 25 A. Yes. For example, I talked about how in the

Rothman - cross

17:32:30 1 government's markets, LSR shares seven percent, LSR is
17:32:36 2 located outside of the geographic markets. NSM shares two
17:32:41 3 percent, NSM's facilities are located outside of the
17:32:44 4 geographic market. The markets are defined around the
17:32:48 5 locations of customers and any supplier that makes sales to
17:32:51 6 customers in the markets is included in the market.

17:32:54 7 Q. So, for example, Imperial has competed with Michigan
17:32:58 8 Sugar for Kroger's business in Idaho, NSM for Hershey's
17:33:03 9 business in Pennsylvania, and LSR for Mar's business in New
17:33:07 10 Jersey, true?

17:33:09 11 A. I'm not disputing that.

17:33:10 12 Q. And you don't dispute, do you, that Imperial also
17:33:14 13 competes with distributors for business both in and outside
17:33:17 14 of the government's alleged market?

17:33:20 15 A. There are instances where Imperial and a distributor
17:33:24 16 will be submitting bids for the same customer, and to some
17:33:31 17 extent there is some competition there.

17:33:34 18 Q. In fact, sir, Imperial has lost business, has it not,
17:33:37 19 to Indiana Sugars, Batory and Sugar Services, correct?

17:33:42 20 A. Yes, there are customers that have chosen to purchase
17:33:46 21 from distributors rather than from Imperial in given bidding
17:33:52 22 opportunities.

17:33:52 23 Q. And Imperial has lost business to ADM, Archer Daniels
17:34:00 24 Midland?

17:34:03 25 A. That wouldn't surprise me.

Rothman - cross

17:34:05 1 Q. Regarding transportation costs, Dr. Rothman, Imperial
17:34:08 2 has only one refinery from which it services customers, is
17:34:12 3 that right?

17:34:12 4 A. Yes, that's correct.

17:34:14 5 Q. And the sugar that Imperial sells here in Delaware
17:34:17 6 comes from the same plant as the sugar that it sells in
17:34:20 7 California, correct?

17:34:22 8 A. Well, my shares -- to the extent Imperial is making
17:34:28 9 sales to customers in California, it would -- it has one
17:34:32 10 refinery.

17:34:33 11 Q. And we can agree, can we not, that Imperial's
17:34:36 12 refinery in Georgia is more than a thousand miles from parts
17:34:39 13 of Texas?

17:34:43 14 A. I'm not disputing that.

17:34:46 15 Q. And yet Texas is Imperial's third largest state by
17:34:50 16 volume sold, true?

17:34:52 17 A. The specific ranges, I don't recall, I'm not
17:34:55 18 disputing that.

17:34:56 19 Q. Let's see if we can add some more figures to our map,
17:35:02 20 Dr. Rothman. These come from DTX 516 in evidence,
17:35:06 21 representing Imperial customers by state. Do you see that,
17:35:09 22 sir?

17:35:12 23 A. Yes.

17:35:13 24 Q. And Imperial has more customers in some of the states
17:35:16 25 that are outside of the government's alleged markets than it

Rothman - cross

17:35:21 1 does in states in the government's alleged markets, true?

17:35:25 2 A. Yes.

17:35:26 3 Q. So look again at Texas. Imperial has more customers
17:35:30 4 in fact in Texas than it has in any other state. Isn't that
17:35:35 5 true?

17:35:37 6 A. That's what these numbers indicate, Texas is a big
17:35:41 7 state.

17:35:41 8 Q. And Imperial has more customers in each, in each of
17:35:45 9 Louisiana, Indiana, Michigan, Ohio, Pennsylvania and New
17:35:51 10 Jersey, than it does in Delaware, DC and West Virginia
17:35:56 11 combined, correct?

17:35:57 12 A. According to these numbers, that's correct. Imperial
17:36:04 13 makes sales outside of the market.

17:36:07 14 Q. And similarly Imperial has more customers in each of
17:36:13 15 Nebraska, Missouri and Louisiana than it does here in
17:36:18 16 Delaware, true?

17:36:21 17 A. According to these numbers, yeah.

17:36:24 18 Q. When Imperial bids on new business, Dr. Rothman, it
17:36:28 19 competes against more than ten suppliers in some instances,
17:36:32 20 isn't that fair to say?

17:36:36 21 A. It could.

17:36:37 22 Q. So, for example, the most recent Kraft Heinz, RFP
17:36:42 23 invites bids from fourteen different suppliers, true?

17:36:47 24 A. I am not disputing that. I don't recall the
17:36:50 25 specifics of the most recent Kraft Heinz RFP.

Rothman - redirect

17:36:54 1 Q. But you do recall, do you not, sir, that a number of
17:36:58 2 those companies, including LSR, are located outside the
17:37:02 3 government's proposed markets, correct?

17:37:06 4 A. I'm not disputing that.

17:37:08 5 Q. So in sum, Dr. Rothman, the government's alleged
17:37:13 6 markets exclude 33 to 47 percent of Imperial's 2021 sales,
17:37:18 7 four of Imperial's top ten states by sales, and states in
17:37:23 8 which Imperial has numerous customers, correct?

17:37:27 9 A. I didn't calculate these numbers. This is -- I'm not
17:37:32 10 disputing them. Again, with market definition, the purpose
17:37:36 11 of market definition is not to identify the states where
17:37:40 12 Imperial has made sales, it's to identify the focus on the
17:37:44 13 areas where there is -- the potential for harm from the
17:37:47 14 proposed acquisition is likely to be the greatest. And this
17:37:51 15 is conflating two different things.

17:37:55 16 MR. MARRIOTT: I have no further questions, Your
17:37:59 17 Honor. Thank you, Dr. Rothman.

17:37:59 18 THE COURT: Thank you. Redirect.

17:38:01 19 MR. MINCER: Your Honor, I'll be very quick.

17:38:01 20 REDIRECT EXAMINATION

17:38:03 21 BY MR. MINCER:

17:38:11 22 Q. Dr. Rothman, could you provide a few examples of
17:38:17 23 industries in which you testified as an expert, just a
17:38:21 24 couple?

17:38:23 25 A. Chemical products, consumer products. Health care

Rothman - redirect

17:38:30 1 products. Auto parts.

17:38:37 2 Q. Do the principles of antitrust economics and the
17:38:42 3 Horizontal Merger Guidelines apply to all those industries?

17:38:46 4 A. Yes, the principles are generally the same. But
17:38:50 5 specific facts of cases and industries can be different, but
17:38:53 6 the principles are fairly general.

17:38:57 7 Q. And do you recall, Dr. Rothman, defendants' counsel
17:39:01 8 asked you about the narrowest market principle. Could you
17:39:07 9 explain what the Horizontal Merger Guidelines say about
17:39:11 10 that?

17:39:13 11 A. I believe counsel asked me if the Horizontal Merger
17:39:17 12 Guidelines say that you should always define the narrowest
17:39:21 13 market, I don't think the guidelines say that. The
17:39:25 14 guidelines discuss risks associated with defining markets
17:39:29 15 that are overly broad and the risks that by defining a
17:39:33 16 market that's overly broad the analysis of -- the suppliers
17:39:37 17 that are not close substitutes for customers in one part of
17:39:41 18 the market could be broad and that could result in
17:39:45 19 essentially confusing rather than clarifying the analysis of
17:39:49 20 competitive effect.

17:39:52 21 Q. And finally, did Defendants' provide you with the
17:39:56 22 data to look at all instances of head-to-head competition
17:40:00 23 between United and Imperial?

17:40:04 24 A. I don't think those data exist. I am not aware of
17:40:08 25 those data -- those data are not available and I'm not sure

17:40:13 1 if those data even exist.

17:40:16 2 MR. MINCER: Thank you. No further questions.

17:40:19 3 THE COURT: All right. Thank you very much.

17:40:21 4 You are excused.

17:40:22 5 Okay. It's 5:40. Why don't we just take a
17:40:31 6 break, or break for the evening right now.

17:40:34 7 Tell me what's coming up so I know what to
17:40:38 8 expect.

17:40:39 9 MR. HANNA: Your Honor --

17:40:43 10 THE COURT: I don't recognize you over there, so
17:40:46 11 used to you being there. I thought you were hiding.

17:40:49 12 MR. HANNA: Your Honor, we expect to call three
17:40:51 13 more witnesses and play a video in the morning. I think
17:40:55 14 it -- we'll have to use the confidentiality, I'll check
17:40:59 15 that, I'm pretty you sure all three of them have
17:41:03 16 confidentiality from third parties.

17:41:04 17 THE COURT: Okay.

17:41:05 18 MR. HANNA: That will be it and we will rest.

17:41:07 19 THE COURT: All right. And you guys are
17:41:09 20 watching your time because your time is kind of --

17:41:12 21 MR. HANNA: We are.

17:41:13 22 MR. BUTERMAN: Your Honor, since, if we have a
17:41:15 23 minute, one thing I did want to raise, we are moving very
17:41:17 24 efficiently. There is one witness, the Hostess witness who
17:41:20 25 we understand is not available until Friday morning to get

17:41:27 1 here. So I don't know if we're going to be done by Thursday
17:41:34 2 afternoon. I don't know what Your Honor's plan was.

17:41:36 3 THE COURT: Right now we are about fifteen hours
17:41:39 4 and forty-seven minutes into a twenty-eight-hour trial. So
17:41:45 5 I would expect closing arguments would be Thursday afternoon
17:41:49 6 or Friday morning.

17:41:50 7 MR. BUTERMAN: So Your Honor, we will go back
17:41:52 8 and if we can, report in the morning on this. We
17:41:57 9 understand.

17:41:58 10 THE COURT: And I know it's someone who is not
17:42:00 11 in your control. So let me know what you get. Tell them
17:42:04 12 what I said, and then see if that is at all helpful.

17:42:08 13 MR. BUTERMAN: I believe it might be, Your
17:42:09 14 Honor.

17:42:09 15 THE COURT: Okay. All right. Anything else?

17:42:13 16 MR. HANNA: No, Your Honor.

17:42:13 17 MR. BUTERMAN: No Your Honor.

17:42:14 18 THE COURT: Thanks very much.

19 (Court adjourned at 5:42 p.m.)

20
21 I hereby certify the foregoing is a true and
22 accurate transcript from my stenographic notes in the proceeding.

23 /s/ Dale C. Hawkins
24 Official Court Reporter
25 U.S. District Court